Jurisdictional Statement

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No. 81-1315

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ROBERT WESTPHALEN,

Appellant,

vs.

CITY OF CHICAGO, a municipal corporation, and BARBARA and EUGENE KRELL,

Appellees.

On Appeal From The Appellate Court Of Illinois

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Was the Appellate Court of Illinois correct in sustaining the ruling of the trial court which held that Chap. 43-24 of the Building Code of Chicago was not repugnant to the due process clause of the Fourteenth Amendment to the U.S. Constitution when, as applied to Appellant, it permitted the building commissioner to revoke the building permit which he had previously issued to Appellant without giving him a hearing (or opportunity for one) on the matter?

To the foregoing proposition there are a number of corollaries, which the Appellant, in deference to Supreme Court Rule 15.1(a) has not included.

* * * * *

And in the event the Court should deem Sec. 1257(3) of Title 28* the more appropriate vehicle, Appellant submits the following:

2. Was the Appellate Court of Illinois correct in sustaining the judgment of the trial court in the face of Appellant's contention that he was denied the right of procedural due process of law as guaranteed to him by the due process clause of the U.S. Constitution when the building permit which had been issued by the Building Commissioner to the Appellant was revoked by the commissioner without giving the Appellant a hearing (or opportunity for one) on the matter?

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* *Flournoy v. Wiener*, 321 U.S. 253, 263 (1944); *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 547 (1922).

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On Appeal From The Appellate Court Of Illinois

JURISDICTIONAL STATEMENT

JURISDICTIONAL STATEMENT

Robert Westphalen, the Appellant, appeals from the judgment[1] of the Appellate Court of Illinois, First District, dated March 3, 1981; thereafter, the Supreme Court of Illinois, on October 19, 1981 entered its Order denying Appellant Leave to Appeal.[2]

[1] See pp. A-1 to A-28 of the Appendix.

[2] See p. A-42 of the Appendix.

The judgment of the Appellate Court of Illinois sustained the judgment of the trial court which found, inter alia, that Chap. 43-24 of the Building Code of Chicago authorized the Building Commissioner to summarily and unilaterally revoke the building permit previously issued by him to the Appellant.

The judgment is final as to the Federal issues involved.[3] The cause was remanded to the trial court solely for the purpose of determining whether the attorneys for the Appellees, Barbara and Eugene Krell are entitled to additional fees, the trial court having previously disallowed such fees.

OPINIONS BELOW

The Opinion of the Appellate Court of Illinois has been reported at 93 Ill.App.3d, p. 1110. This Opinion also appears at pp. A-1 to A-28 of the Appendix.

The trial court's Memorandum Accompanying Decision appears at pp. A-31 to A-41 of the Appendix.

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[3] *Radio Station WOW v. Johnson*, 326 U.S. 120, 127 (1945); *Construction Laborers v. Curry*, 371 U.S. 542, 550, 551 (1963); *Cox Broadcasting v. Cohn*, 420 U.S. 469, 477-479 (1975).

JURISDICTION

The case was instituted initially as a Building Code violation proceeding by the City of Chicago. Barbara and Eugene Krell then filed their suit under Sec. 11-13-15 of Chap. 24 of the Ill. Rev. Stat. which gives adjacent owners the right to sue to enforce building and zoning violations. During the pendency of these suits, the Appellant had submitted plans and had been issued a building permit[4] by the Building Commissioner for the purpose of correcting the alleged violations. Shortly thereafter, the Building Commissioner revoked the issued permit without benefit of a hearing.[5]

The trial court held, *inter alia*, that the commissioner had the authority to so revoke because of the provisions contained in Chap. 43-24 of the Building Code of Chicago.[6] The Appellate Court affirmed.

The Supreme Court of Illinois, on October 19, 1981, entered its Order denying Appellant's Petition for Leave to Appeal. (See p. A-42 of Appendix).

Notice of Appeal was filed with the Appellate Court of Illinois, First District, on November 13, 1981. (See pp. A-50 to A-52 of Appendix).

This Appeal is being docketed within 90 days from the time the Supreme Court of Illinois denied Appellant's Petition for Leave to Appeal.

Jurisdiction to hear this Appeal rests upon 28 U.S.C. Sec. 1257(2).

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[4] See p. A-45 of Appendix.

[5] See p. A-46 of Appendix.

[6] See p. A-55 of Appendix.

CONSTITUTIONAL PROVISIONS, STATUTES AND CODES

Fourteenth Amendment, U.S. Constitution:

> (N)or shall any State deprive any person . . . of property without due process of law;

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28 U.S.C. Sec. 1257(2):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court as follows:
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, . . . and the decision is in favor of its validity;

Chap. 43-4, Chicago Building Code, p. A-53 of Appendix;

Chap. 43-7, Chicago Building Code, p. A-54 of Appendix;

Chap. 43-10, Chicago Building Code, p. A-54 of Appendix;

Chap. 43-24, Chicago Building Code, p. A-55 of Appendix.

RAISING THE FEDERAL QUESTION

In the Chicago Building Code there are only two ordinances which deal with annulment and revocation of building permits. These are Chap. 43-10[7] and Chap. 43-24.[8] Chap. 43-10 provides that any departure from approved plans shall operate to annul the permit and that the commissioner shall have power to stop work done contrary to the approved plans while Sec. 43-24 provides that if work done on a building is conducted in violation of any of the building provisions of the code, it shall be the duty of the commissioner of buildings to revoke the permit.

Neither ordinance makes any provision for notice and hearing, nor are any guidelines set up to govern the conduct of the building commissioner in any action he may take in connection with issued permits. Both ordinances delegate arbitrary power to the commissioner to make quasi-judicial or judicial decisions. In this particular case, the building commissioner has failed to exercise any implied powers he may have to set up fair rules of procedure (notice and hearing).

Since the trial judge has stated unequivocally in his "Memorandum Accompanying Decision" (p. A-36 of Appendix) that as to whether the issued permit established a ground for estoppel, he has relied upon Sec. 43-24 of the Building Code, it behooves the Appellant to show how that ordinance was drawn into question.

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[7] See p. A-54 of Appendix.

[8] See p. A-55 of Appendix.

The final judgment in the instant case was entered on October 7, 1977. On November 4, 1977, Appellant presented his motion to vacate judgment order (pp. A-47 to A-48 of Appendix), which raised the question that Municipal Ordinances Sec. 43-10 and Sec. 43-24 are both constitutionally defective and that the Commissioner, having chosen to issue the Permit, may not unilaterally withdraw that right on grounds of alleged non-compliance or alleged illegality absent fundamentally fair procedures to determine whether the alleged non-compliance has actually occurred or whether the alleged illegality actually exists and may not be taken away without observing minimum procedures required by the 14 Amendment which are held to be notice and a hearing. (See Excerpt from Appellant's Motion to Vacate Judgment, pp. C-1096, C-1097, Common Law Record, pp. A-47 to A-48 of Appendix). This Motion was denied by the trial court (See p. A-49 of Appendix).

Finally, the Appellate Court in its Opinion (p. A-3 of the Appendix), states as follows:

> As to defendant's first issue on appeal, he contends that he was denied procedural due process because his building permit was revoked without a pre-revocation hearing. The defendant argues that he had a property right entitled to Fourteenth Amendment protection. (U.S. Const., amend. XIV).

The Appellate Court in its Opinion (p. A-4 of Appendix), then states as follows:

> We agree with the trial court's finding that the defendant provided no showing that a pre-revocation hearing is required when a permit is revoked immediately upon the discovery that it was issued in error. Courts have held that licenses and permits are privileges from which no vested rights attach. See. e.g. *Weinstein v. Daley* (1967) 85 Ill. App.2d 470, 229 N.E.2d 357; see generally 9 Mc-

> Quillan, Municipal Corporations, sec. 26.81a, at 183 (3rd ed. rev. 1978). While a license or permit cannot be abrogated without sufficient cause, (9 McQuillan, Municipal Corporations, sec. 26.81a, at 183 (3rd ed. rev. 1978), in the absence of a legal requirement there is no necessity for notice and opportunity to be heard before the revocation (9 McQuillan, Municipal Corporations, sec. 26.88 at 194 (3rd ed. rev. 1978). (See *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy* (1961) 367 U.S. 886, 6 L.Ed. 2d 1230, 81 S. Ct. 1743) No such legal requirement exists in this State.

Thus the Appellate Court reveals that the Federal Question was not only raised but ruled upon. Under these circumstances, it is deemed to be conclusive that the Federal issue was raised.[9]

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[9] *Whitney v. California*, 274 U.S. 357, 360, 361 (1927); *Raley v. Ohio*, 360 U.S. 423, 436 (1959).

STATEMENT OF THE CASE

The Appellant, Robert Westphalen, is the owner of an apartment building located at 5325-29 S. Kimbark Avenue, adjacent to the University of Chicago, originally constructed in 1901 as a ten apartment structure. Sometime in the early 20's the building had been converted to a 37 apartment complex and so it was when the Appellant bought it in 1945. In 1964, the City of Chicago brought a major suit against the Appellant alleging numerous building and zoning violations. In an effort to comply with the City's demands, Appellant presented plans to the Building Department but was refused a permit because the Zoning Commissioner felt that zoning requirements had not been met as to the following:

1. Off-street parking, and
2. Minimum lot area. (See p. A-3 of Appendix).

The Appellant then appealed to the Zoning Board of Appeals which reversed the zoning commissioner and entered the following resolution:

> "make repairs to the non-conforming three story brick apartment building containing 16 dwelling and 19 efficiency units, on premises at 5325-29 S. Kimbark Ave., upon condition that all applicable ordinances of the City of Chicago shall be complied with and that plans in triplicate shall be identified as the plans approved by the Board of Appeals before a permit is issued." (See p. A-44 of Appendix),

whereupon, the Appellant, having been issued a permit, proceeded to make the necessary repairs to put him in compliance with the City's requirements. No Appeal from the Resolution was ever taken by the City.

The instant case was instituted by the City on June 26, 1975, the Krells' suit on September 24, 1975 pursuant to Sec. 11-13-15 of the Ill. Rev. Statutes which permits neighboring property owners to enforce building and zoning violations; the two cases were consolidated.

On May 28, 1976 pursuant to demands embodied in Para. 2 of the City's Amended Complaint, Appellant submitted plans to the building department, whereupon the plans having been duly approved, a permit, No. B 517296, was issued to Appellant (See p. A-45 of Appendix).

On June 3, 1976, the building department sent a letter to Appellant notifying him that permit No. B 517296 was revoked. (See p. A-46 of Appendix). The text of the letter is as follows:

> You are hereby notified that permit #517296 issued on 5/28/76 for above premises is hereby revoked because: Failure to comply with Sec. 7.5-4 (minimum lot req.) R-4 District and Sec. 7.12-2 (off-street parking) R-4 District. Chicago Zoning Ord. Secs. 7.5-4, 7.12-2). You will kindly return without delay, said permit to this office for cancellation. (See p. A-46 of Appendix).

Thus, the reasons ascribed by the building commissioner for revocation are identical to those advanced by the Zoning Commissioner and overruled by the Zoning Board of Appeals in 1964.

No adversary hearing was held in connection with the permit revocation. (Appellate Court Opinion, p. A-3 of Appendix).

THE QUESTION IS SUBSTANTIAL

The question as to Fourteenth Amendment implications surrounding the proposition as to whether a building permit, once issued, can be revoked by the issuing agency without benefit of proper notice and opportunity for hearing is indeed a substantial one, especially when Chap. 43-24 of the Chicago Building Code is relied upon as substantive authority. As far as is known to Appellant, no precedent exists to support the conclusions reached by the trial court and acquiesced in by the Appellate Court of Illinois that no legal requirements exist which entitle Appellant to an opportunity for hearing on the matter of the permit revocation.

Chap. 43-24 of the Chicago Building Code is as follows:

> If the work, in, upon, or about any building or structure shall be conducted in violation of any of the building provisions of this code, it shall be the duty of the commissioner of buildings to revoke the permit for the building or wrecking operations in connection with which such violations shall have taken place. It shall be unlawful, after the revocation of such permit, to proceed with building or wrecking operations unless such permit shall first have been reinstated or re-issued by the commissioner of buildings. Before a permit so revoked may be lawfully re-issued or reinstated, the entire building and building site shall first be put into condition corresponding with the requirements in the building provisions of this code, and any work or material applied to the same in violation of any of the provisions shall first be removed from such building, and all material not in compliance with the building provisions of this code shall be removed from the premises.

At the outset, Chap. 43-24 is inherently defective in its application to the instant proceedings for the following reasons:

1. It applies to building, not zoning violations;
2. It delegates arbitrary power to the building commissioner to make a judicial or quasi-judicial decision without setting up any guidelines;
3. There is no provision which sets up fair rules of procedure for the protection of the property owner;
4. In the absence of explicit guidelines and assuming that the building commissioner has implied powers to set up fair rules of procedure, as applied to Appellant, in this particular case, the commissioner has not exercised this power which at a minimum must include notice and hearing.

The trial judge, in his "Memorandum Accompanying Decision" (p. A-36 of Appendix) states as follows:

> As to whether the issued permit establishes a ground for estoppel, the Court relies upon Section 43-24 of the Building Code. It provides "If work . . . shall be conducted in violation of any of the building provisions of this code, it shall be the duty of the commissioner of buildings to revoke the permit." Moreover, *City of Rockford v. Sallee*, 129 Ill. App. 2d 75, at p.79 says: "Illegal issuance of a permit by a ministerial officer does not estop a municipality from relying on the illegality." Manifestly, the Commissioner is not a ministerial officer. However, a permit improperly issued would be an illegal permit and the ruling makes clear that the City is not estopped from relying on the illegality.

Here the trial court states that illegal issuance of a permit by a ministerial officer does not estop a municipality from relying on the illegality and then states that manifestly, the building commissioner is not

a ministerial officer. The permit in this case was issued by the building commissioner pursuant to the provisions of Chap. 43-7 of the Chicago Building Code, not by a ministerial officer. Indeed, according to the terms of Chap. 43-7, in the last analysis, only the building commissioner can issue a permit. (See p. A-54 of Appendix).

Furthermore, the reason for the revocation of the permit is unequivocally ascribed by the building commissioner to be certain alleged zoning violations, viz. off-street parking and minimum lot area, which the trial court found did not exist. This is evidenced by the following:

The Appellate Court (p. A-4 of Appendix) reasons as follows:

> In the case at bar, after the building permit had been issued to the defendant, the building commissioner determined that the defendant's building was not in compliance with certain zoning ordinances. Thus, the commissioner was empowered to revoke the permit because a violation of section 43-4 of the Municipal Code existed. See Municipal Code of Chicago, ch. 43, sec. 43-24.[10]

In spite of the obvious non sequitur, the Appellate Court then finds that the reasons alleged for the permit revocation by the building commissioner do not exist (p. A-8 of Appendix) to-wit:

> While the Krells' complaint did allege three zoning violations, the trial court did not find that zoning violations had occurred.

Nevertheless, the Appellate Court, in attempting to rationalize its Opinion, is in no way deterred from pursuing a theory that Appellant's permit was illegally

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[10] The text of Chap. 43-4 of the Chicago Bldg. Code appears at p. A-53 of the Appendix.

issued, hence a nullity which confers no rights on the Appellant.

The flaw in this thinking is that the determination that the permit was a nullity cannot be established on any unilateral, automatic or self-executing basis. The only way the nullity of the permit could be established, if at all, is by an adjudicatory hearing, and at this hearing, the Appellant had a constitutional right to be present. The legitimate area of inquiry in this case is not was the permit illegally issued but was the permit illegally revoked?

In support of its thesis that no pre-revocation hearing is required, the Appellate Court cites only two cases, to-wit: *Weinstein v. Daley* (1967), 85 Ill.App.2d 470 and *Cafeteria and Restaurant Workers Union, Local 473 v. McElroy* (1961), 367 U.S. 886. Both of these cases are not in point. *Weinstein v. Daley* involves a liquor license which was deemed to be a privilege as opposed to a right while *Cafeteria Workers v. McElroy* is an exception to the general rule that deprivation of property interests requires prior hearing and involves government employment and its relation to security on a government base.[11]

Fuentes v. Shevin, 407 U.S. 67 (1972), is authority for the following:

> It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake. (p. 81)
>
> The right to a prior hearing, of course, attaches only to the deprivation of an interest encompassed within the Fourteenth Amendment's protection. (p. 84)

[11] *Fuentes v. Shevin*, 407 U.S. 67 (1972), Footnote at p. 91.

> If the right to notice and hearing is to serve its full purpose, then, it is clear it must be granted at a time when the deprivation can still be prevented. (p. 87)

The Appellant believes that this case should have been decided by a simple application of the foregoing principles. Thus, the first question to be determined is: Does the Appellant have an interest that is encompassed within the Fourteenth Amendment's protection? Does real estate ownership, the right to engage in a lawful business, the right to collect rents and profits, and rights arising from the expenditure of moneys as a result of the issuance of the permit give Appellant a property right that is encompassed within the Fourteenth Amendment's protection?

In *Board of Regents v. Roth*, 408 U.S. 564, 571, 572 (1972), the Court states as follows:

> The Court has also made clear that the property interest protected by the procedural due process extends well beyond actual ownership of real estate, chattels or money. . . .

And finally, in *Bell v. Burson*, 402 U.S. 535, 539 (1971), the Court says:

> Once licenses are issued, as in petitioner's case, then continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such case the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. This is but an application of the general proposition that relevant constitutional restraints limit state powers to terminate an entitlement whether the entitlement is denominated a "right" or a "privilege."

> . . . it is fundamental that except in emergency situations (and this is not one) due process requires that when a state seeks to terminate an interest such as that herein involved, it must afford "notice and hearing appropriate to the nature of the case" before the termination becomes effective. (p. 542)

CONCLUSION

For these reasons, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Appendix

1.

Opinion Of The Appellate Court

Third Division.
Filed: 3/4/81

77-1863, 78-1095, 78-1251

CITY OF CHICAGO,
Plaintiff-Appellee,
v.
ROBERT WESTPHALEN,
Defendant-Appellant,
and
BARBARA & EUGENE KRELL,
Plaintiffs-Appellees,
Cross-Appellants,
v.
ROBERT WESTPHALEN,
Defendant-Appellant,
Cross-Appellee.

Appeal from the Circuit Court of Cook County.

Honorable Archibald J. Carey, Judge Presiding.

MISS JUSTICE MCGILLICUDDY DELIVERED THE OPINION OF THE COURT:

The City of Chicago (City) filed a complaint against the defendant, Robert Westphalen, the owner of a parcel of real property improved with a three-story brick structure located in the City of Chicago, alleging numerous municipal code violations at said property. A complaint alleging the same and additional violations was filed by the plaintiffs, Barbara and Eugene Krell, against the defendant pursuant to section 11-13-15 of the Illinois Municipal Code (Ill.Rev.Stat., 1975, ch. 24, par. 11-13-15) which allows owners of neighboring property to bring suit to enforce municipal building and zoning codes. The City's complaint was dismissed and then reinstated and consolidated with the Krells' suit. After a bench trial the court found the defendant's building contained 69 violations of the Municipal Code of Chicago (Municipal Code), appointed a receiver to bring the

building into compliance, fined the defendant $100 for each violation and suspended the fines since the building was vacant and not producing income at the time of judgment.

The defendant's brief contains 21 points for appeal which we believe, in the interest of clarity and conciseness, can be combined to create seven main issues. They are: (1) whether the defendant was denied procedural due process when his building permit was revoked without a prior hearing; (2) whether the defendant was granted a lawful nonconforming use by a 1964 Zoning Board of Appeals resolution and, if so, whether this resolution was subject to collateral attack in the present proceeding; (3) whether the defendant's building was subject to a fire regulation pertaining to interior stairway walls; (4) whether the plaintiffs were estopped or barred from bringing the present suit on the basis of collateral estoppel; (5) whether the defendant's trial was unfair because the defendant alleges that the trial judge was prejudiced and abused his discretion; (6) whether the trial judge erred in denying the defendant's motion for summary judgment, and (7) whether the Krells were proper plaintiffs. The Krells have cross-appealed alleging the trial court erroneously denied their post-trial petition for costs and attorneys' fees in accordance with section 11-13-15 of the Illinois Municipal Code. Ill.Rev. Stat., 1975, ch. 24, par. 11-13-15.

The building which is the subject of this appeal is an apartment building located on the 5300 block of South Kimbark Avenue in Chicago, Illinois. It was constructed in 1901 and contained 10 apartments, three on each floor and one in the basement. According to the defendant's testimony, the building has been converted to a larger number of units prior to his purchase of it in 1945. At the time of trial the building had 35 units or apartments. The defendant has not resided in the building since 1957.

In June 1975 the City filed suit against the defendant alleging 29 violations of the Municipal Code based on an inspection of the defendant's building by the City of

Chicago Building Department (Building Department) conducted on April 25, 1975. The Krells filed suit in September 1975 citing numerous ordinance violations including the violations alleged in the City's complaint. Each of the parties filed amended complaints alleging additional violations discovered during subsequent inspections of the building.

In May 1976, while the proceedings were pending, the defendant submitted to the Building Department an application for a permit to make repairs to the building. The permit was issued on May 28, 1976, but was subsequently revoked by the building commissioner on June 3, 1976, because of a lack of compliance with sections 7.5-4 (minimum lot area) and 7.12-2 (off-street parking) of the Chicago Zoning Ordinance (Municipal Code of Chicago, ch. 194A, secs. 7.5-4, 7.12-2). No hearing on the matter of the permit was held prior to its revocation.

I

As the defendant's first issue on appeal, he contends he was denied procedural due process because his building permit was revoked without a pre-revocation hearing. The defendant argues that he had a property right entitled to Fourteenth Amendment protection (U.S. Const., amend. XIV). The defendant relies on *Trans-Oceanic Oil Corp. v. City of Santa Barbara* (1948), 85 Cal.App.2d 776, 194 P.2d 148. In that case the permit was revoked over five years after its issuance based on a subsequently enacted zoning ordinance that made the permittee's activities illegal. The California Court of Appeals reversed the revocation finding the permittee had acquired a vested property right based on his substantial expenditures made in reliance on the validly issued permit. Since the revocation was without notice or hearing, the court said it was inoperative and without legal force.

The instant case is distinguishable because the permit was not validly issued. Before the Commissioner of Buildings issues a building permit he must examine and approve all drawings and plans for the proposed con-

struction or alteration. One determination that must be made is that the building and premises are in compliance with the Chicago Zoning Ordinance. (Municipal Code of Chicago, ch. 43, sec. 43-4.) In the case at bar, after the building permit had been issued to the defendant, the building commissioner determined that the defendant's building was not in compliance with certain zoning ordinances. Thus, the commissioner was empowered to revoke the permit because a violation of section 43-4 of the Municipal Code existed. See Municipal Code of Chicago, ch. 43, sec. 43-24.

We agree with the trial court's finding that the defendant provided no showing that a pre-revocation hearing is required when a permit is revoked immediately upon the discovery that it was issued in error. Courts have held that licenses and permits are privileges from which no vested property rights attach. (See, *e.g.*, *Weinstein v. Daley* (1967), 85 Ill.App.2d 470, 229 N.E.2d 357; see generally, 9 McQuillin, Municipal Corporations, sec. 26.81a, at 183 (3rd ed. rev. 1978).) While a license or permit cannot be abrogated without sufficient cause (9 McQuillin, Municipal Corporations, sec. 26.81a, at 183 (3rd ed. rev. 1978)), in the absence of a legal requirement there is no necessity for notice and opportunity to be heard before the revocation (9 McQuillin, Municipal Corporations, sec. 26.88, at 194 (3rd ed. rev. 1978)). (See *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy* (1961), 367 U.S. 886, 6 L.Ed.2d 1230, 81 S.Ct. 1743.) No such legal requirement exists in this State.

Furthermore, under Illinois law the permittee does not have a vested right to complete his approved plans unless the building permit was legally issued and the property owner substantially changed his position or incurred substantial expenditures or obligations. (See, *e.g.*, *O'Laughlin v. City of Chicago* (1976), 65 Ill.2d 183, 357 N.E.2d 472; *City of Chicago v. Zellers* (1965), 64 Ill. App.2d 24, 212 N.E.2d 737.) In *Ganley v. City of Chicago* (1974), 18 Ill.App.3d 248, 309 N.E.2d 653, the City revoked a building permit three weeks after issuance upon the discovery that the proposed building would violate the minimum lot requirements specified in

section 7.5-2 of the City zoning ordinance (Municipal Code of Chicago, ch. 194A, sec. 7.5-2). Although the court found the plaintiff's permit had been issued through normal administrative procedures, the court held that the permit was illegally issued because the ministerial officer exceeded the authority conferred upon him. The court stated a building permit should not have been granted in violation of the terms of the zoning ordinance and concluded that the unauthorized permit was a nullity and conferred no rights upon the permittee.

The defendant in the instant case also contends that the trial judge's finding that the permit was improperly issued was not supported by the evidence. He cites the testimony of witness A.W. Brunson, Chief Plan Examiner for the Department of Buildings. Brunson stated the defendant's architectural plans submitted during the permit application process were processed in the normal manner and in accordance with standards of procedure established by the Building Department. To further support his argument the defendant states that the letter of revocation did not state that the permit was revoked because of a subordinate's mistake.

Alex H. Zimmerman, Deputy Commissioner of Buildings, testified that on a day or two prior to June 3, 1976, he met with an assistant corporation counsel for the City and the zoning administrator. The recommendation to revoke defendant's permit was made at this meeting. Entered into evidence was a memorandum dated June 3, 1976, written by Zimmerman which stated that the defendant's application for permit should not have been approved because the plans did not conform to the Zoning Board of Appeals resolution of November 24, 1964, or to certain zoning ordinance requirements. Additionally, Irving M. Addis, the defendant's architect, testified on direct examination during the plaintiff's case, that he prepared plans for changes to the defendant's building sometime prior to May 24, 1976, in order to obtain a building permit. He indicated that this set of plans, which was submitted in May 1976 with the

application for a permit, contained a breakdown of efficiency units and apartments which did not comply with the requirements of the Zoning Board of Appeals resolution.

In *People ex rel. American Nat'l Bank & Trust Co. v. Smith* (1969), 110 Ill.App.2d 354, 249 N.E.2d 232, the court held that a subsequent discovery of noncompliance with the judicial order specifying certain prerequisites raises a valid right in the building commissioner to reexamine the legality of a permit's issuance. We believe a similar right exists in the commissioner when, as in the instant case, noncompliance with the Zoning Board of Appeals resolution, as well as zoning violations, are subsequently discovered. Therefore, on the basis of the testimony and exhibits discussed above, we believe there was sufficient evidence to support a finding that the defendant's permit was erroneously issued and that the permit was a nullity and conferred no rights upon the defendant such as the right to a pre-revocation hearing.

II

As his second argument on appeal, the defendant contends he was granted a nonconforming use by the 1964 resolution of the Zoning Board of Appeals. He argues, therefore, that the present action is a forbidden collateral attack of this resolution.

In 1964 the City of Chicago brought a lawsuit against the defendant citing numerous building violations on the same property as involved in the instant case including noncompliance with sections 78-10.1, 78-10.2 and 62-3.2 of the Municipal Code. Included in the defendant's answer to this complaint was a denial that he violated sections 78-10.1 and 78-10.2 because the use of his building constituted a valid nonconforming use. The defendant's answer also indicated that he would comply with section 62-3.2 which required the enclosure of stairway walls with partitions providing a fire resistance rating of not less than two hours. The certified trial court half-sheet for the 1964 case made a part

of the record in the instant case indicated that the defendant was found guilty of the ordinance violations described in the City's complaint. Judgment and costs were suspended.

Thereafter, the defendant submitted to the City Building Department an application for a building permit to correct the City ordinance violations. His request was denied by the office of zoning administrator because the building, which contained 15 apartments and 22 efficiency units, did not conform to zoning ordinance requirements as to off-street parking, minimum lot area and maximum number of efficiency units (Municipal Code of Chicago, ch. 194A, secs. 7.12, 7.5-4, 7.5(6)). The defendant appealed to the Zoning Board of Appeals and argued that the building had a valid nonconforming use because the conversion of 10 apartments to 37 units occurred when the zoning ordinances permitted such a conversion. The Board of Appeals reversed the zoning administrator's decision and ordered that the defendant be issued a permit. The resolution indicated in part:

> "RESOLVED, that the appeal be and it hereby is sustained . . . and he [the zoning administrator] is authorized to issue a permit to make repairs to the non-conforming three-story brick apartment building containing 16 dwelling and 19 efficiency units[1] . . . upon condition that all applicable ordinances of the City of Chicago shall be complied with. . . ."

A nonconforming use is a use of land or a building that does not comply with current zoning regulations but which is permitted by statute or ordinance to continue for a specified period of time because the use was lawful at the time the zoning regulation was adopted. See, *e.g.*, *City of Rockford v. Sallee* (1970), 129 Ill.App.2d 75, 262 N.E.2d 485; Ill.Rev.Stat., 1975, ch. 24, par. 11-

[1] The resolution gives a breakdown of apartment and efficiency units different from the configuration appearing in the zoning administrator's form denying the permit application. The reason for this discrepancy does not appear in the record.

13-1; Municipal Code of Chicago, ch. 194A, art. 3; see generally 8A McQuillin, Municipal Corporations, sec. 25.180, at 6 (3rd ed. rev. 1976); 2 Yokley, Zoning Law & Practice, sec. 16-2, at 211-12 (3rd ed. 1965).

While we do not concede that the defendant's building was granted a nonconforming zoning use in 1964, assuming arguendo that this conclusion is correct, we fail to see how this status protected the defendant from the instant proceedings. The Chicago Zoning Ordinance permits the continued use of land, a building or a structure for residence, business, commercial or manufacturing purposes when such use is no longer permitted in the district. Article 2 of the ordinance provides that "[t]he provisions in the Chicago Zoning Ordinance are *cumulative and additional limitations* upon all other laws and ordinances . . . governing any subject matter in The Chicago Zoning Ordinance." (Emphasis added.) (Municipal Code of Chicago, ch. 194A, art. 2.) The zoning ordinance does not immunize the owner of a building having a nonconforming use from requirements to insure the public health and safety. Thus, we believe the defendant was subject to the building, electrical, plumbing and fire provisions of the Municipal Code regardless of the existence of a lawful nonconforming use. As the 69 violations named in the City's complaint did not involve the zoning violations considered in 1964, it cannot be said that the City's present action against the defendant was a collateral attack of the 1964 Zoning Board of Appeals proceeding. While the Krells' complaint did allege three zoning violations, the trial court did not find that zoning violations had occurred.[2] Therefore, we feel that it is unnecessary to determine whether this portion of the Krells' complaint was a forbidden collateral attack on the 1964 proceedings.

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[2] The written judgment prepared by the City stated "that the subject Building is found in violation of sixty-nine Provisions of the Municipal Code as set forth in the record." The Memorandum Accompanying Decision cited only building, electrical, plumbing and fire regulation violations.

III

The defendant next contends that his building was not subject to the fire regulations requiring two-hour fire resistant walls for interior stairways in buildings exceeding three stories in height. (Municipal Code of Chicago, ch. 62, sec. 62-3.2(a), ch. 78, sec. 78-10.1.) He bases this argument on the fact that the provision of the Municipal Code defining a basement containing apartments as the first story to a building was not enacted until 1942. He alleges that since his building contained basement apartments prior to that time, this provision should not be applied retroactively so as to classify the defendant's building as four stories.

The Krells argue that the defendant's logic is strained and wholly inconsistent with the clear intention of the City Council to apply the fire protection provisions to pre-ordinance buildings. They cite section 78-4 of the Municipal Code which states: "Existing buildings shall comply with all applicable fire protection requirements of this code." To further support their argument, the Krells cite *City of Chicago v. Sheridan* (1976), 40 Ill. App.3d 886, 353 N.E.2d 270. *Sheridan* held that the fire protection provisions of chapter 62 of the Municipal Code applied to all buildings whenever built and stated:

> "We believe the law to be well settled that it was the intent of the City Council to make the fire protection requirements of the building code apply to all 'existing' buildings and that that term included 'pre-ordinance' buildings." 40 Ill.App.3d at 888, 353 N.E.2d at 272.

Applying the *Sheridan* rationale to the case at bar, we hold that the defendant's building was subject to the provisions of chapter 62 of the Municipal Code. In view of the intention to apply the fire requirements to pre-ordinance buildings, we further hold that the defendant's basement should be considered as one of four stories irrespective of the enactment date of the provision describing a basement as a story when it consists of apartments. Therefore, the trial judge properly concluded that the defendant's building exceeded three stories

in height and thus required two-hour fire resistant interior stairway walls.

IV

The defendant's fourth issue on appeal was whether the plaintiffs were estopped or barred from bringing the present suit based on principles of collateral estoppel or estoppel by verdict. In 1971 the City sued the defendant charging him with various building, electrical and fire regulation violations. The defendant contends that the trial court found that he had complied with the applicable ordinance requirements in 1971 and thus the plaintiffs in the instant case should be precluded from relitigating these issues.

Estoppel by verdict or collateral estoppel is a branch of res judicata (*Kramer v. Chicago Title & Trust Co.* (1979), 69 Ill.App.3d 1015, 387 N.E.2d 1105; *City of Evanston v. G. & S. Mortgage & Investment Corp.* (1973), 11 Ill.App.3d 642, 297 N.E.2d 331) which prohibits the relitigation of the same issues in different claims or causes of action[3] by the same parties or their privies (*City of Burbank v. Glazer* (1979), 76 Ill.App.3d 294, 395 N.E.2d 97). The parties to the subsequent action are estopped from relitigating those issues which were in fact raised and decided in the prior action. (*Pierog v. H. F. Karl Contractors, Inc.* (1976), 39 Ill.App.3d 1057, 351 N.E.2d 249; *City of Evanston; City of Chicago v. Provus* (1969), 115 Ill.App.2d 176, 253 N.E.2d 182.) There can be no estoppel by verdict or collateral estoppel unless there shall have been a finding of specific fact in the former judgment or record that is material to that case and to the pending case. (*Department of Transportation v. Shaw* (1978), 68 Ill.2d 342, 369 N.E.2d 884.) The

[3] Where the same building ordinance violations are alleged in a subsequent suit, but concerning different dates, the subsequent action is a different claim or cause of action because each day of such violations constitutes a separate and distinct offense. Municipal Code of Chicago, ch. 39, sec. 39-3; see *City of Evanston v. G. & S. Mortgage & Investment Corp.* (1973) 11 Ill.App.3d 642, 297 N.E.2d 331.

burden of establishing the defense of collateral estoppel is upon the party invoking it (*Chicago Historical Society v. Paschen* (1956), 9 Ill.2d 378, 137 N.E.2d 832), and the party must show with clarity and certainty the precise issues and judgment in the former action. *Kedzierski v. Kedzierski* (1967), 86 Ill.App.2d 264, 229 N.E.2d 919.

The defendant in the instant case produced the Circuit Court order entered in the 1971 case. The order provided:

> "This cause coming to be heard by the Court.
>
> "IT IS HEREBY ORDERED, ADJUDGED AND DECREED that this cause is dismissed all costs having been paid."

This order does not reflect a finding of specific fact or a determination of the issues. Nothing is disclosed as to the substance of the dismissal. Therefore, the defendant's defense of collateral estoppel was properly denied by the trial court. See *Pierog; Continental-Midwest Corp. v. Hotel Sherman, Inc.* (1957), 13 Ill.App.2d 188, 141 N.E.2d 400.

V

The defendant's fifth issue on appeal is whether his trial was unfair because the trial judge was prejudiced and abused his discretion. To support his contentions the defendant states that the trial judge:

(1) Prejudged the case in favor of the City;

(2) Stated on several occasions that the issues were not going to be decided on the pleadings;

(3) Attempted to "bludgeon" the defendant into reaching a settlement with the City;

(4) Pursued a course of "economic attrition" to force the defendant to agree to a settlement with the City;

(5) Advised the defendant to get another lawyer;

(6) Stated on several occasions in advance of trial and before hearing evidence that the building

commissioner had a right to revoke the defendant's permit;

(7) Abused his discretion in continuing an injunction;

(8) Abused his discretion in the matter of holding lengthy and costly receivership hearings without entering definitive orders thereafter, and

(9) Refused to enter orders on the defendant's motions for leave to file a petition for mandamus and counterclaim and refused to address the defendant's request for a jury trial which had been granted by a previous judge.

A.

Initially it should be noted that during a non-jury trial the comments of a trial judge are allowed greater latitude than would be acceptable were a jury present. (*Joray Mason Contractors, Inc. v. Four J's Construction Corp.* (1978), 61 Ill.App.3d 410, 378 N.E.2d 328.) Furthermore, not every comment or unguarded expression by a trial judge will support a claim of prejudice. A showing of prejudicial effect is required. (*Faltysek v. Kloepfer* (1971), 3 Ill.App.3d 8, 279 N.E.2d 105.) The defendant has not sustained this burden.

Reviewing the defendant's first four points and the context within which the remarks were made, we fail to see any impropriety by the trial judge or any prejudice to the defendant. The remarks relied upon by the defendant were made during pre-trial hearings when the trial judge made numerous attempts to resolve the case to the satisfaction of the parties thereby avoiding the need to determine the legal issues involved. The trial judge, cognizant of the fact that he had entered a restraining order prohibiting tenant occupancy of the defendant's building,[4] indicated his desire to dissolve the order and

[4] The order had been entered on January 19, 1977, pursuant to the emergency motion of the City and the Krells to vacate the defendant's building after the gas boiler malfunctioned causing one tenant's death and the hospitalization of five others due to carbon monoxide poisoning. The temporary restraining order was continued by further orders of the court until June 1, 1977.

to restore the defendant's property to an income-producing operation. He encouraged the defendant to work with the City to get approval of plans to repair the building in order to made it habitable. At no time was economic force used by the judge to force a settlement between the parties.

We also cannot find any prejudice to the defendant based on an alleged comment by the trial court advising the defendant to retain another lawyer. The defendant quotes a passage from the transcript of a post-trial hearing in which the judge admits that he advised the defendant once in open court to retain another lawyer because of the fruitlessness of the efforts to resolve the matter before the court. In reviewing the voluminous record, however, we can find only one passage from which an inference can be made that the judge suggested that the defendant obtain a new lawyer. The context of the comment was as follows:

> "THE COURT: The exercises of law are proper, but what I am trying to do is to see how we can get a matter of the Court cleared up, and the way it can be cleared up, I have indicated three months ago.
>
> "[Defendant's Counsel]: I can't go along with that. I am going to say this much, I don't want to get in the way of settlement. I am not here to make up his [defendant's] mind. I have offered the last time, and I am going to do it one more time, and I may do it anyway. If I can get leave of Court to withdraw, if I felt for one minute that I was impeding any settlement action, I would get out of here in a minute, because this is a stone around my neck with you but having once undertaken the duty I can't turn my tail and run, because I am not made that way, and I am going to see this through as long as he wants me to, to any forum that it takes us.
>
> "Now, I am not going to permit him—
>
> "THE COURT: Sometimes they do change pitchers in the ballgame.

"[Defendant's Counsel]: I am grateful for the Judge, for thinking that the pitcher ought to be relieved, but my client has had an experience—

"THE COURT: I have been hearing these matters since January, their fourth or fifth case, fourth or fifth lawyer, and he has experience with the other ones. His results have been extremely negative."

This colloquy again evidences the trial judge's attempt to encourage a settlement and avoid lengthy litigation. The defendant contends that the judge's comments undermined the lawyer-client relationship but does not show how his relationship with his attorney was affected especially since he continued to be represented by the same attorney. Furthermore, we note that the defendant's own attorney initiated the subject of his withdrawal as counsel. Thus, we fail to see evidence that the defendant was prejudiced.

We also disagree with the defendant's sixth point that the trial judge prejudged the case when he stated that the Commissioner of the Department of Buildings had a right to revoke the defendant's building permit. Reviewing the entire transcript of the report of proceedings for the pre-trial hearing on June 1, 1977, we interpret the statement cited by the defendant as an indication that the building commissioners had the power to revoke permits. The judge did not conclude at that time, however, that the commissioner had rightfully revoked the defendant's permit. This is evidenced by the judge's subsequent statement that public officers can modify their orders, provided reasons exist for doing so, and the indication by the judge that he was going to examine the defendant's petition for mandamus and the defendant's allegations that the building commissioner had no right to revoke the permit before making a determination on this issue. In view of these further statements by the trial judge, we conclude that the judge did not make a pre-determination that the defendant's building permit was rightfully revoked.

B.

The defendant also contends that the trial court abused its discretion in continuing the temporary restraining order entered on January 19, 1977, ordering that the defendant's building be vacated until further order of the court. That order was issued pursuant to emergency motions filed by the plaintiffs which alleged the defendant's building failed to conform to minimum standards of health and safety established by City ordinance and that the defendant's building was imminently dangerous to the public health and safety due to carbon monoxide leaks. The court order was entered after the plaintiffs presented testimony in the presence of the defendant's counsel and the court determined that the defendant's building failed to conform to certain minimum health and safety standards. The cause was continued to January 20 when the plaintiffs presented additional witnesses concerning the carbon monoxide leakage. On that date the court modified its order of January 19 by limiting the duration of the temporary restraining order to ten days.

On January 21, 1977, the City presented an emergency motion for the court to order the gas company to shut off the gas supply to the defendant's building, because occupants in the building were using their gas stoves to heat their apartments. Upon notice to all the parties and testimony of witnesses, the court found a dangerous and hazardous condition existed in the defendant's building and granted the motion. A subsequent order was issued on January 27 directing the City to cause the gas supply to be restored to the defendant's building upon the installation of a pressure stat, spill switch and louver panel in the boiler room. This order recited the defendant's agreement to have the work completed immediately. Thereafter, the court continued its January 19 temporary restraining order on January 27 to February 25, 1977; On February 22 to March 16, 1977; on March 16 to April 15, 1977; on April 15 to May 19, 1977, and on June 1, 1977, granted the defendant's motion to dissolve the temporary restraining order.

The defendant contends that his motion to dissolve, which was filed on February 4, 1977, should have been granted at the hearing on February 18. At that time the defendant called five witnesses. Three of the witnesses testified that they had been hired by the defendant to repair the boiler and gas stoves in the defendant's building after the carbon monoxide leaks occurred. The defendant also called a City building department supervisor and boiler inspector. During the course of this testimony the City's counsel stipulated that a City boiler inspector had taken a carbon monoxide test and no adverse leakage was discovered after the burner in the boiler had been running for one hour. The defendant urges that on the basis of the testimony presented he conclusively established that the reasons for the restraining order had ceased.

The trial judge concluded that the evidence presented by the defendant at the February 18 hearing did not demonstrate that the defendant's building was fit for human habitation or that the building was brought into compliance with the law. We find that this conclusion was not erroneous or improper. The restraining order in effect was issued because the defendant's building failed to conform to certain minimum health and safety standards. The only evidence presented by the defendant concerned the absence of carbon monoxide leakage. The evidence showed that the defendant had not complied with the January 27 court order which recited his agreement to install a pressure stat, spill switch and louver panels in the boiler room. While the City boiler inspector admitted that City ordinances did not require a spill switch or pressure stats on the boiler, the inspector did testify that the gas company would not turn the gas back on unless a spill switch was installed. One of the defendant's witnesses also testified that the water pipes froze and burst throughout the defendant's building after the gas company shut off the gas supply. Since the defendant's building was without its natural gas supply and since there was no evidence that the defendant had rectified his building's failure to conform to minimum health and safety standards, the court properly denied

the defendant's motion to dissolve the extended temporary restraining order on February 18, 1977.

At subsequent hearings no witnesses were presented. In March the City indicated that the boiler had been turned on by agreement of the parties. The plaintiffs continued to argue that there was insufficient evidence presented by the defendant as to the safety of his building. Thereafter, the judge suggested that the defendant submit an application for permit and repair plans to the Building Department so that the defendant could make his building habitable. Plans were submitted to the Building Department but certain portions were not approved. In April the judge again found defendant's building not habitable and continued the injunction.

While no transcript was made a part of the record for the afternoon hearing on May 19, 1977, it appears from the June 1, 1977, transcript that the parties agreed that a new inspection should be made of the defendant's building and a report made to the court. On June 1 counsel for the City informed the judge that the defendant refused entry to City inspectors. A new agreement was thereafter reached whereby the defendant would allow an inspection of his building. The judge then granted the defendant's motion to dissolve the temporary restraining order, not because of changed conditions in the defendant's building, but because the order had continued too long and no bond had been ordered. He advised the City to file a new motion for preliminary injunction based on insufficiencies found in the defendant's building as a result of the scheduled inspection.

A temporary restraining order is an emergency remedy of extremely brief duration. (*Paddington Corp. v. Foremost Sales Promotions, Inc.* (1973), 13 Ill.App.3d 170, 300 N.E.2d 484.) When issued ex parte it cannot be granted for longer than ten days (Ill.Rev.Stat., 1975, ch. 69, par. 3-1) but when notice is provided can be issued for a period greater than ten days. (*Seagram Distillers Co. v. Foremost Sales Promotions, Inc.* (1973), 13 Ill. App.3d 166, 300 N.E.2d 490.) The court has inherent

power during the pendency of a case before it to issue and vacate a temporary restraining order. To dissolve the order, however, there must be sufficient basis in the record to support the action taken by the court. *Kraft v. Solon* (1975), 32 Ill.App.3d 557, 336 N.E.2d 577.

As discussed above the temporary restraining order was issued because of the carbon monoxide leakage and evidence presented by the City that the defendant's building failed to conform to minimum health and safety standards. The City was prepared to stipulate in February 1977 that the carbon monoxide leakage had been corrected. However, the judge stated in March that he had heard evidence concerning grave conditions that existed in the defendant's building and in April that the defendant's building was not habitable.

It is well settled that the party seeking a dissolution order had the burden of supporting his motion. When no showing to justify the dissolution of the injunction has been made, it is error for the trial court to dissolve a temporary restraining order. (*Kraft.*) The defendant's motion to dissolve the temporary restraining order alleged that the carbon monoxide leakage had been remedied. The defendant presented no other basis to support his motion. We feel the restraining order should have been extended until the court heard the evidence to determine whether the defendant's building was still dangerous to the health and safety of its tenants. Therefore, we disagree with the defendant's contention that the judge should have granted his motion to dissolve the temporary restraining order in February.

C.

As further evidence of abuse the defendant alleges that the trial court erroneously appointed a receiver to bring the building into compliance with the Municipal Code of Chicago.

Although the appointment of a receiver is generally a harsh remedy, it is an equitable remedy used when in the sound discretion of the trial judge it is needed to in-

sure complete justice. To determine whether or not the appointment of a receiver was reasonable, the particular circumstances surrounding the case must be examined. *Hurst v. Papierz* (1973), 16 Ill.App.3d 574, 306 N.E.2d 532, *cert. denied*, (1974), 419 U.S. 835, 42 L.Ed.23d 62, 95 S.Ct. 62.

In the instant case, at the conclusion of numerous pretrial hearings and 16 days of trial, the court concluded that the defendant's building violated 69 provisions of the Municipal Code. Citing considerable testimony from representatives of the City of Chicago as to building, electrical, plumbing and fire regulation violations and citing the abundant exhibits provided, the trial judge found the defendant's building unsafe, dangerous and unfit for decent human habitation. These findings were not contrary to manifest weight of the evidence, nor does the defendant contend otherwise. Throughout the proceedings, the defendant did not argue an absence of violations but instead argued that he had affirmative defenses which, as discussed above, were properly rejected.

The appointment of a receiver to obtain compliance with building codes was upheld in *Community Renewal Foundation, Inc. v. Chicago Title & Trust Co.* (1970), 44 Ill.2d 284, 255 N.E.2d 908. (See also *City of Chicago v. Cosmopolitan Nat'l Bank* (1979), 77 Ill.App.3d 212, 395 N.E.2d 1070.) In *Community Renewal Foundation* the court-appointed receiver had issued certificates for the purpose of obtaining funds to permit necessary repairs and alterations. In an action seeking specific performance of a contract to purchase the certificates, the Supreme Court addressed the propriety of the appointment of the receiver. The court stated:

> "We regard the appointment of a receiver to obtain compliance with the building codes, where because of continuing violations the property has become unsafe and a danger to the community, as within the inherent powers of an equity court. [Citations.] Too, the providing of adequate housing accommodations is a problem of first importance and urgency

> for the cities. The appointment of a receiver when necessary to preserve and restore residential property is also obviously in the public interest and under circumstances appearing here was an appropriate exercise of a court's equity powers. Citations." 44 Ill.2d at 291, 255 N.E.2d 913.

In the instant case, many of the violations in the defendant's building were of a continuing nature. For example, the City brought a complaint against the defendant in 1964 and the defendant was subsequently found guilty of ordinance violations described in that complaint. Many of those violations, based on building inspections conducted on September 2, 1963, and March 13, 1964, again appeared in the City's present complaint based on October 1 and December 5, 1975, inspections. While the record contains numerous examples of continuous violations, we do not deem it necessary to discuss them in detail. To conclude, however, we feel there was ample evidence in the record to support the trial judge's appointment of a receiver. This exercise of equitable powers was not unreasonable or an abuse of discretion since because of continuing violations, the defendant's building remained in disrepair and unsafe.

D.

As the defendant's ninth point to support his argument that his trial was unfair, he cites the trial judge's refusal to enter written orders denying his motions for leave to file a petition for mandamus and counterclaim and the trial judge's refusal to allow a jury on the law counts. With regard to the court's failure to enter written orders, the defendant relies on *Urso v. Reynolds Metals Co.* (1968), 95 Ill.App.2d 251, 238 N.E.2d 271. The defendant points to a reference in *Urso* to chancery courts that "[u]nder current court practice the submitting and entry of written orders is now used in law as well as chancery." (95 Ill.App.2d at 256, 238 N.E.2d at 273.) The *Urso* court did not, however, rule on the requirement that chancery courts must enter written or-

ders and is, therefore, of no precedential value to the issue at bar.

Orders on motions other than in the course of trials are governed by Supreme Court Rule 271 (Ill.Rev.Stat., 1977, ch. 110A, par. 271) which states:

> "When the court rules upon a motion other than in the course of trial, the attorney for the prevailing party shall prepare and present to the court the order or judgment to be entered, unless the court directs otherwise."

We feel Rule 271 governs the instant proceedings and, therefore, hold that the filing of written orders on motions other than during the course of trial is not mandatory but discretionary with the trial judge. The judge in the case at bar denied the defendant's motions for leave to file a petition for mandamus and counterclaim but indicated he would not enter a written order at the time of these denials. Thus, within the context of Supreme Court Rule 271, the court directed otherwise. Furthermore, while the judge did not indicate amply his reason for refusal, the defendant has not shown how this refusal prejudiced his case Therefore, we reject the defendant's argument in this regard as well.

The defendant also contends his trial was unfair because he was denied a trial by jury as to the law issues in his case.

The City of Chicago and the private plaintiffs brought the present action against the defendant pursuant to section 11-13-15 of the Illinois Municipal Code (Ill.Rev. Stat., 1975, ch. 24, par. 11-13-15) which authorized a proceeding in equity to restrain and prevent the violation of ordinances governing building code violations. A similar statute governing zoning ordinance violations was the subject of discussion in *City of Highland Park v. Calder* (1932), 269 Ill.App. 255. The *Calder* court relied on *Parmelee v Price* (1904), 208 Ill. 544, 70 N.E. 725, and held it was not error to deny the defendant's request for a jury trial stating:

> "'Where a new class of cases is directed by the legislature to be tried in chancery, and it appears, when tested by the general principles of equity, that they are of an equitable nature and can be more appropriately tried in a court of equity than a court of law, the chancellor will have the right, as in other cases in chancery, to determine all questions of fact without submitting them to a jury.'" 269 Ill.App. at 261.

(See *City of Chicago v. Miller* (1963), 27 Ill.2d 211, 188 N.E.2d 694; *Lawn Savings & Loan Association v. Quinn* (1967), 81 Ill.App.2d 304, 225 N.E.2d 683; *Oppenheimer Bros., Inc. v. Joyce & Co.* (1958), 20 Ill.App.2d 34, 154 N.E.2d 856 (where equity has acquired jurisdiction, it may determine all matters including legal issues).) The trial judge in the instant case denied the defendant's motion for a jury trial indicating that the case was a chancery matter and would be treated as such. We believe this ruling was not erroneous.

In conclusion, we cannot say that the trial judge displayed bias or conducted himself improperly. The defendant received a fair and impartial trial. We can only but agree with the plaintiffs to this suit that the proceedings were continuously delayed by the defense due to lack of preparation, repeated diversionary tactics and continuous uncalled for remarks and interruptions. As the judge indicated in his Memorandum Accompanying Decision, there had been 23 court appearances and 16 days of trial. (Prior to that judge's assignment to the case on December 5, 1976, there had been 46 court appearances.) We feel the trial judge should be commended for his patience and impartiality throughout this unduly long and trying case.

VI

Twenty-six months after the City filed its first complaint in the instant case the defendant presented a motion for summary judgment asserting that he was entitled to judgment as a matter of law based on:

(1) The defense of res judicata;

(2) The failure of the City to appeal the 1964 Zoning Board of Appeals resolution, and

(3) The failure of the City to provide the defendant with adequate notice and hearing on the matter of his building permit revocation.

The defendant argues on appeal that this motion was erroneously denied.

A summary judgment is properly granted when the pleadings, depositions and admissions on file, together with any affidavits and exhibits, establish that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. (*Barnes v. Washington* (1973), 56 Ill.2d 22, 305 N.E.2d 535; *Molloy v. Santucci Construction Co.* (1979), 78 Ill.App.3d 249, 397 N.E.2d 125; Ill.Rev.Stat., 1977, ch. 110, par. 57(3).) For the reasons discussed in parts I through IV of this opinion, the defendant was not entitled to a judgment as a matter of law. Therefore, the trial court did not err in denying his motion for summary judgment.

VII

As his final argument on appeal, the defendant contends that the trial court committed error by not dismissing the Krells' complaint. He argues the multiple complaints caused a duplication of effort by the City and the Krells and indirectly harassed the defendant by forcing him to defend two lawsuits. The defendant also contends the Krells did not come to court with clean hands.

The defendant cites a portion of section 11-13-15 of the Illinois Municipal Code (Ill.Rev.Stat., 1975, ch. 24, par. 11-13-15) which confers the right on adjoining landowners and tenants to enforce zoning and building ordinances. The pertinent portion of the statute provides:

> "In case any building or structure, . . . is constructed, reconstructed, altered, repaired, converted, or maintained, or any building or structure

> . . . is used in violation of an ordinance or ordinances adopted under Division 13, 31 or 31.1 of the Illinois Municipal Code [ordinances regulating zoning, unsafe buildings and building code violations], or of any ordinance or other regulation made under the authority conferred thereby, the proper local authorities of the municipality, or any owner or tenant of real property, within 500 feet[5] in any direction of the property on which the building or structure in question is located . . . may institute any appropriate action or proceeding. . . ."

The defendant relies on the conjunction "or" in the statute and contends that either the governmental authorities or private citizens may institute legal proceedings but not both. He contends that private citizens may bring suit only when municipal authorities fail or refuse to act.

We disagree with the defendant's contentions and hold that the word "or" as it appears in section 11-13-15 should not be given such a narrow construction. The predecessor of section 11-13-15 was section 73-9 of the "Revised Cities and Villages Act" (Ill.Rev.Stat., 1941, ch. 24, par. 73-9) which authorized municipal authorities to institute appropriate proceedings to enforce zoning ordinances. In 1953 the Act was amended to enlarge the class of plaintiffs and to increase the allowable costs in those actions. (See *Pasfield v. Donovan* (1956), 7 Ill.2d 563, 131 N.E.2d 504.) The statute again was amended in 1969 to enlarge the types of ordinance violations by adding ordinances regulating unsafe buildings and building codes (Ill.Rev.Stat., 1969, ch. 24, par. 11-13-15) and in 1977 the statute was amended to increase the area within which the private plaintiffs had to reside in order to bring suit (Ill.Rev.Stat., 1977, ch. 24, par. 11-13-15). Thus, it is evident that the legislature intended to expand the scope of the statute to prevent zoning and housing ordinance violations. The defendant's narrow

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[5] While this action was pending, the statute was amended to extend the distance of property owners and tenants to 1200 feet of the structure. Ill.Rev.Stat., 1977, ch. 24, par. 11-13-15.

construction, which would limit the actions and parties involved, is inconsistent with this apparent legislative purpose.

We also hold that the Krells were proper parties because their interests were not identical to the City's. The Krells' complaint alleged violations such as electrical wiring inadequacies, shortages of bathrooms, the existence of criminal activities in the defendant's building and zoning violations which were not encompassed by the City's complaint. In addition, the Krells sought recovery for the monetary damages they suffered.

Courts in this State have permitted intervention by private landowners in suits instituted by municipalities to prosecute zoning violations where the private landowners had interests that differed from the interests of the municipality and general public. (See *Anundson v. City of Chicago* (1970), 44 Ill.2d 491, 256 N.E.2d 1; *Bredberg v. City of Wheaton* (1962), 24 Ill.2d 612, 182 N.E.2d 742; *Williams v. City of Bloomington* (1969), 108 Ill.App.2d 307, 247 N.E.2d 466.) The defendant seeks to distinguish these cases because the private parties therein were adjoining landowners and because the landowners were not plaintiffs pursuant to section 11-13-15 of the Illinois Municipal Code. We feel these distinctions are not determinative; rather, we believe these cases are notable for and evidence of our courts' concerns for the protection of the rights and interests of private landowners. In view of this we cannot adopt the defendant's theory that the Krells should be precluded from the judicial process because the City has also acted to enforce its ordinances.

The defendant also argues that the trial court erred in failing to dismiss the Krells' complaint on the grounds that they lacked clean hands and conspired to destroy the defendant's legitimate enterprise of owning and operating a rental building. The defendant bases this contention on the fact that the Krells were encouraged to bring suit and received financial support during the pre-trial phase of their case from the South East

Chicago Commission (SECC),[6] a community organization. He also contends that the Krells were the beneficiaries of illegal acts of the SECC, namely, the unauthorized practice of law. We reject this argument and find it unsubstantiated by the record. There is also no merit to this argument because, as stated above, the Krells have a statutory right to bring this action. The fact that they received financial support in order to pursue their legal remedies is not cause for dismissal of their lawsuit.

VIII

The final issue in this case concerns the cross-appeal by the Krells. After entry of judgment against the defendant, the Krells filed a petition for attorneys' fees in the sum of $19,384.25 for 237-3/4 hours of trial work and costs of $2,235.60 for filing fees, deposition expenses and the like. The Krells argue that the trial judge erroneously denied their petition for attorneys' fees and costs. They claim their right to attorneys' fees and costs is mandatory and rely on section 11-13-15 of the Illinois Municipal Code (Ill.Rev.Stat., 1975, ch. 24, par. 11-13-15) which states in part:

> "If an owner or tenant files suit hereunder and the court finds that the defendant has engaged in any of the foregoing prohibited activities, then the court *shall* allow the plaintiff a reasonable sum of money for the services of the plaintiff's attorney. This allowance *shall* be a part of the costs of the litigation assessed against the defendant, and may be recovered as such." [Emphasis added.]

Apart from statute there is no right on the part of a successful party to recover attorneys' fees and the

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[6] The SECC is a not-for-profit corporation whose purpose is to compile information regarding the incidence of crime and violations of City ordinances and State laws relative to the use of real property in the Oakland, Kenwood, Hyde Park and Woodlawn areas in Chicago. The commission recommends and takes appropriate action based on the information compiled.

ordinary expenses and burdens of litigation. (*Meyer v. Marshall* (1976), 62 Ill.2d 435, 343 N.E.2d 479; see *People ex rel. Holland v. McMichael* (1979), 79 Ill.App. 3d 974, 398 N.E.2d 1138 (recovery of costs).) The first sentence of the provision quoted above became effective in 1969. (1969 Ill. Laws, P.A. 76-585.) Prior to that time the award of attorneys' fees was discretionary. (*Anundson v. City of Chicago* (1973), 15 Ill.App.3d 1032, 305 N.E.2d 376; see Ill.Rev.Stat., 1967, ch. 24, par. 11-13-15.) As a result of the 1969 amendment, substituting "shall" for "may in its discretion," the courts have held that the award of attorneys' fees to a successful plaintiff is indeed mandatory. (*Meyer, cf. Anundson* (comparison of pre-1969 and post-1969 statutes).) Based on this rationale, the award of costs of the litigation also is mandatory since the second sentence of the quoted portion of section 11-13-15 states the award of attorneys' fees shall be *a part of* the costs assessed against the defendant. Thus, an award of attorneys' fees should not be the only assessment against the defendant.

While the defendant concedes the award of attorneys' fees is normally mandatory, he argues that the Krells should not be granted such an award because they came into equity without clean hands. Since this argument was addressed and rejected in part VII of this opinion, we will not discuss it here. The defendant also questions the reasonableness of the amount of fees requested alleging that much of the work performed on behalf of the Krells was duplicative of the City's efforts.

It appears from the record that the trial judge based his denial of costs, including attorneys' fees, on the fact that the Krells received financial assistance from the SECC. The SECC paid the pre-trial legal fees of over $58,000 but it did not reimburse the Krells for fees and costs incurred as a result of trial. As stated above, the award of attorneys' fees is mandatory. Additionally, an award of fees is a permissible statutory sanction against the defendant to secure compliance with legislative command. (See *Fairfield v. Donovan* (1956), 7 Ill.2d 563, 131 N.E.2d 504.) It matters not that the SECC encouraged the Krells to bring their lawsuit by

providing financial support for their cause, and, therefore, we must reverse the trial court's ruling in this matter.

Although we find error with the trial court's denial of fees and costs, we will not enter judgment in the amount requested by the Krells. The Krells argue that such an award should be entered by this court pursuant to Supreme Court Rule 366(a) (Ill.Rev.Stat., 1979, ch. 110A, par. 366(a)) because there are no material questions of fact relative to fees and costs. We disagree. At the hearing on the Krells' petition for costs and during the present appeal, the defendant raised the argument that the amount sought was unreasonable. The trial judge did not conduct an evidentiary hearing on the issue of reasonableness, specifically indicating that he did not wish to entertain that matter.

Since the amount or reasonableness of costs and attorneys' fees awarded is a matter of discretion with the trial judge (*Fleming v. Dillon* (1938), 370 Ill. 325, 18 N.E.2d 910; *Riordan v. Riordan* (1977), 47 Ill.App.3d 1019, 365 N.E.2d 429), we remand this cause to the Circuit Court with directions to hear evidence and determine the reasonable value of services rendered and costs incurred by the Krells' counsel.

For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed. The order denying an award of costs and attorneys' fees to the Krells is reversed and the cause remanded with directions to determine the reasonable amount thereof and to enter an award in that amount.

Affirmed in part and reversed and remanded with directions.

Rizzi, PJ., and McNamara, J., concur.

2.

Judgment Order
(R. C1070-C1071)

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
CHANCERY DIVISION

BARBARA KRELL and EUGENE KRELL, *Plaintiffs,*	)	
v.	)	No. 75 CH 5992
ROBERT I. WESTPHALEN, *Defendant.*	)	
CITY OF CHICAGO, a Municipal Corporation, *Plaintiff,*	)	
v.	)	No. 75 CH 53559
ROBERT I. WESTPHALEN, *Defendant.*	)	

JUDGMENT

The Court has held a trial of these consolidated cases and has, by its Memorandum Accompanying Decision, given October 5, 1977, entered its findings of fact and conclusions of law, one of which is that the subject Building is found in violation of sixty-nine Provisions of the Municipal Code as set forth in the record.

Now, therefore, it is ordered, adjudged and decreed as follows:

1. A fine of One Hundred Dollars ($100.00) is hereby levied for each of the sixty-nine violations, and the said fine is hereby suspended.

2. George S. Denison is hereby appointed Receiver to proceed to bring the Building into compliance with all applicable City Code provisions expeditiously, and shall furnish bond in the amount of Fifty Thousand Dollars ($50,000).

3. The Building shall remain vacant until it is brought into compliance with the applicable provisions of the Municipal Code.

ENTER:

/s/ ARCHIBALD J. CAREY, JR.
JUDGE

WILLIAM R. QUINLAN
Corporation Counsel
John W. McCaffrey
Asst. Corporation Counsel
Room 610, City Hall
Chicago, Illinois 60602
Phone: 744-6945

3.

Memorandum Accompanying Decision
(R. C1134-C1142)

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
CHANCERY DIVISION

BARBARA KRELL and EUGENE KRELL, *Plaintiffs,*	)	
v.	)	No. 75 CH 5992
ROBERT I. WESTPHALEN, *Defendant.*	)	
CITY OF CHICAGO, a municipal corporation, *Plaintiff,*	)	
v.	)	No. 75 CH 53559
ROBERT I. WESTPHALEN, *Defendant.*	)	

MEMORANDUM ACCOMPANYING DECISION

In the effort to separate and identify certain elements and issues, and to put matters in some chronological order, this Court has seen fit to submit this memorandum concerning the findings and judgments in this case. Pleadings, testimony, exhibits and documents submitted by both sides have been carefully considered and also, the proposed findings of fact and conclusions of law, jointly submitted by the plaintiffs.

BACKGROUND: The building which is the subject of this case is an apartment building located at 5325-29 South Kimbark Avenue in Chicago, Illinois. It is owned by Robert I. Westphalen who is the defendant.

In 1901 it was constructed of ten (10) apartments, three (3) on each of three floors, and one in the basement. At this time, it consists of thirty-five (35) units, eighteen (18) of which are efficiency units and the other seventeen (17) are small dwelling units.

In 1945 the defendant acquired it, but testified that when he was in the building in 1937 it had been converted to a larger number of units on each of the upper floors. Some lost records of the 1920's leave room to believe, the change may have occurred during that period. Before 1957 the defendant installed additional apartments in the basement. In 1962 the defendant registered it as a rooming house. Until 1965 it had ten (10) or eleven (11) units on each of the upper floors which shared three (3) or less toilets per floor. Since 1975 it has not been a rooming house.

September 11, 1964 defendant submitted an application for a building permit to the Building Department. It was sought to cure certain City Code violations and was accompanied by a set of blueprints drawn by William F. Thornton.

November 24, 1964 the Zoning Board of Appeals approved this application for a permit to make alterations to construct nineteen (19) efficiency units and sixteen (16) dwelling units. Further, it was required that the building be brought into compliance with all applicable provisions of the Building Code.

Thereafter the defendant constructed three (3) additional bathrooms on each floor and one (1) more in the basement, and also new walls to permit access to several of the units. However, there was testimony that this changed the configuration. Certain work called for by the Thornton plan, he testified was not done. Omissions included a failure to provide corridor walls and ceilings with material of a fire resistance of one (1) hour; to provide such walls separating units; such walls enclosing the boiler; and stairwell enclosures were not enclosed with masonry with a fire resistant character of two (2) hours. The 1964 application showed the work to be done at a cost of $9,200.

In 1965 the building was altered and converted within the meaning of Sections 47-2, 52.1, 78-8.2 (b) and 78-10.1 of the Building Code. These include the requirement that whenever the number of dwelling units is increased, the new or added area shall comply with all the building provisions of the Code.

May 24, 1976 defendant submitted application for a permit accompanied by a set of blueprints drawn by Irving Addis (the first). Testimony was given that these plans did not provide for electrical work, for stairwell enclosures with a two (2) hour fire-resistance rating, for fire exit doors or for private baths for existing three-room units. Further, they called for a configuration at variance with the application for alterations approved by the Zoning Board in 1964.

On May 28, 1976 a permit was issued, but three (3) business days later, (but 6 calendar days) on June 3, 1976, the Building Commissioner revoked it. The revocation was ascribed to a discovery that the permit had been improperly issued. The defendant continued to do work until June 11, 1976, when ordered by the police to stop.

A second application was filed shortly thereafter accompanied by plans of Addis (the second) but it was identical to the first except that it provided for a change in the number of efficiency and dwelling units. That application was denied.

The defendant is eighty-six (86) years of age, lives about fifty (50) miles from the building, in Lake Zurich, and, although he has employed assistance, has never had professional building management. This Court concludes that the defendant has been unable or unwilling to secure the permits necessary to bring the building into compliance with the Chicago Building Code, in that he has not done so.

In January 1977 carbon monoxide resulted, the Court was told, from a malfunctioning gas-fired boiler in the basement. One tenant died and five others were injured or made ill. Because of testimony that the parts per

million of carbon monoxide present in the building was at a level which was perilous to the health and life of tenants, this Court ordered the gas cut off. With the gas supply turned off, when very severe weather developed, this Court ordered the building vacated which was completed about January 10, 1977. The building has been vacant since then.

THE INSTANT CASE:

June 16, 1975, The City filed but it was dismissed September 16, 1975

September 29, 1975, The Krells filed

November 7, 1975, The City case was reinstated by Judge Cerda

November 25, 1975, Judge Cerda ordered the two consolidated

This Court has been informed that prior to this judge being assigned on December 5, 1976 to Calendar 6 on which this case appears, there were forty-six (46) court appearances. Since December 5, 1976, there have been twenty-three (23), plus a trial which covered sixteen (16) days.

THE PLAINTIFF, CITY OF CHICAGO, SEEKS:

Findings of "guilty" for violations

Fines for said violations in amount of $13,800

The appointment of a receiver instructed to bring the building into compliance

Defendant ordered to place sufficient funds on deposit with Circuit Court to bring the building into compliance

Injunctive relief to keep building vacant until compliance is effected

THE PLAINTIFFS, KRELL, SEEK:

Findings of violations and fines therefor

Injunction to prevent defendant using basement apartments as unfit because too far below grade

Damages of $5,000 for decreased value and attorney's fees

THE DEFENDANT CHALLENGES THE STANDING OF THE CITY ON GROUNDS:

1. Right to sue
2. Res judicata
3. Estoppel
4. Laches

DEFENDANT CHALLENGES STANDING OF KRELL ON GROUNDS:

1. Not real parties in interest
2. Southeast Chicago Commission exceeded its charter in providing assistance to Krells
3. Laches

THE DEFENDANT ASSERTED AFFIRMATIVE DEFENSES:

1. Revocation of permit issued May 28, 1976, was unlawful violation of defendant's right to "due Process" and asked leave to file mandamus action for reissuance
2. Showing numerous efforts put forth and money spent to bring building within compliance
3. That defendant has established a lawful prior non-conforming use

Because any defense sustained, might be conclusive, the Court considered the defenses first and sets forth these Conclusions of Law:

1. The City has standing under Chapter 39-6 of the Building Code, "An appropriate official . . . may request the Department of Law to make application to any court of competent jurisdiction for an injunction requiring compliance or such other order as Court may deem necessary".
2. The defense of "res judicata" is not a bar. In case No. *71 CH 51566*, the defendant was charged with a number of violations and that case was dismissed. However, that file discloses a hearing date of July 23, 1971, and that Judge Geocaris (Super-

vising Judge of Housing Court) ordered the cause "dismissed all costs having been paid 47.50 7-28-71." However, it included no findings on the charges brought by Richard L. Curry, Corporation Counsel including that "said violations have not been corrected." These charges pertained, inter alia, to the fire extinguishers, flaking paint, defective exterior stair system, RR porch system, inadequate illumination and required repair of interior walls or ceilings. The mere dismissal without other explanation and the absence of findings moves this Court to find an absence of the defense, res judicata, because the charges were not judicially acted upon.

3. The defense of estoppel is not a bar. *Gregory v. City of Wheaton*, 23 Ill 2nd 402 at page 408, declares, "Mere non-action by a city is insufficient to invoke estoppel".

   As to whether the issued permit established a ground for estoppel, the Court relies upon Section 43.24 of the Building Code. It provides "If work . . . shall be conducted in violation of any of the building provisions of this code, it shall be the duty of the Commissioner of Buildings to revoke the permit." Moreover, *City of Rockford v. Sallee*, 129 Ill App.2nd 75, at page 79 states: "Illegal issuance of a permit by a ministerial officer does not estop a municipality from relying on the illegality." Manifestly, the Commissioner is not a ministerial officer. However, a permit improperly issued would be an illegal permit and the ruling makes clear that the City is not estopped from relying on the illegality.

   Estoppel against the plaintiffs, Krell, is denied because the defendant has not shown any relying upon representations of said plaintiffs.

4. The bar of laches is denied as to both plaintiffs. As to the City, *City of Chicago v. Miller*, 27 Ill. 2nd 211, holds that Laches does not apply to governmental units . . . As to the Krells, the testimony of

Barbara Krell was that she did not know of specific violations until 1975. Even if they both did, they were not cloaked with official responsibility and the provision of the code, giving a resident within five hundred (500) feet the right to bring suit, does not set forth any statute of limitations.

5. The defendant contends the Krells were not the real parties in interest. Ill. Rev. Stat. Chapter 24, Section 11-13-15 confers upon a resident within five hundred (500) feet the right to maintain such an action as this. Thus the Court finds that the Krells are proper parties, because was testimony from them that their property values were measurably lowered, and that they went out of their way to avoid passing near the building because of fear. The testimony that they did not decide to institute suit until they learned they would have financial and other assistance from the Southeast Chicago Commission does not demolish their status as parties in interest.

6. The Southeast Chicago Commission did not exceed the scope of its authority. In the judgment of the Court this is determined by item 5 of the "Purposes for which the corporation was organized" as set forth in the charter issued May 21, 1952. Paragraph 5 reads "To recommend and take such action as may be appropriate in the light of the information, studies and surveys concerning the incidence of crime and the use of real property in the area" as to the use of real property in the area. If supplying counsel and even financial assistance to the plaintiffs, Krell, was deemed appropriate, the Court concludes it was within the province of the Commission.

THE AFFIRMATIVE DEFENSES

1. The assertion of a violation of the right of due process is regarded by the Court as a major matter, whether it is based upon the Fourteenth Amendment to the United States Constitution or

any provision of lesser dignity. However, this basic right has been identified, construed, interpreted and applied with varying results. It has even been asserted fruitlessly.

In the instant case, it is contended by the defendant that the failure to provide him a hearing before the revocation was a violation of this right. The Court has been provided no showing that in this case that, upon the discovery that the permit, because of the error of a subordinate, had been improperly issued entitled the defendant to a hearing before the revocation. The fact that it was issued within three (3) business days after the issuance of the permit, the fact that the architect who drew the plans was notified of the revocation and later told the defendant that the basis stated was "correct" (Addis letter of June 7, 1977, Px 39) or even that the defendant testified he didn't know how much he had spent in those three (3) days relying upon the permit (although seven (7) days by the calendar) is all incidental and immaterial. There simply has been no showing here that the defendant was entitled to a hearing and that the Building Commissioner was without authority to revoke the permit. Indeed, Section 43-24 of the Building Code makes it his duty to stop illegal work.

2. As to the showing of effort and money spent to bring the building within compliance, the Court recognizes that the defendant has invested many efforts and measurable funds, to bring the building into compliance. From a review of all the evidence adduced herein, the Court concludes simply that he did not succeed in bringing the building into compliance.

3. The remaining argument is that the defendant established a lawful prior non-conforming use. He submits evidence that the Zoning Board of Appeals identified the building as a three-story building with a basement in 1964. But the record

is replete with testimony and exhibits that it had three (3) stories and another called a basement which included three (3) living units. The criteria qualify it as a floor within all the characteristics which determine its proper classification and category.

29 Ill. 2nd 591, the Eggert case requires that, a non-conforming use be predicated upon a continuation of a lawful use existing at the time of the adoption of the zoning ordinance. Although the Court has been given evidence of efforts to correct a specific violation, the Court has heard rebutting testimony as to its accomplishment. The Court recognizes as set forth in *Sanderson v. De Kalb*, 24 Ill. App.3rd 101 as submitted by defendant that a non-conforming use is a property right. However, at page 111, that Court indicated that "The record does not clearly disclose whether the use of appellant's property constituted a non-conforming use" and said that that cause should be remanded "in light of the uncertainty." On that same premise, this Court has faced uncertainty because there has never been a showing as required by the Code 78.10 that the non-conforming use complied with all the provisions of the Code, and certainly not at the time this action was instituted.

Of paramount importance is the provision of the Building Code Section 78-4 that existing buildings shall comply with all fire protection provisions. *Kaukas v. City of Chicago*, 27 Ill. 2nd 197 at page 201 said, "It is clear that a city may lawfully make building requirements applicable to buildings in existence at the time an ordinance was enacted, even though these buildings complied with the ordinance in effect at the time the new ordinance was enacted." The Court has heard much testimony of violations of these requirements but has not been provided with evidence that these requirements are presently met.

Finally, the defendant argues in his post trial memorandum that a defense standing alone should be

decisive. This Court cannot embrace so restricted a view. In the same document, the defendant admits that violations exist in the building. In the course of the trial an abundance of testimony was given by proper representatives of the Building Department and an abundance of exhibits were provided, all showing evidence of violations. That any defense, of those presented in this case, should stand alone to be decisive, is a position this Court cannot addopt.

ALLEGATIONS OF THE PLAINTIFF: The Court had before it considerable testimony from representatives of the departments of the City of Chicago, as to building, electrical, plumbing and fire regulations violations. Without reciting them all, the Court makes the following findings of fact:

1. The building was four (4) stories of residential units, and finds that it is unsafe and dangerous in that:

   a. Walls enclosing stairwells are of combustible materials which are not of two-hour fire-resistant character.

   b. The boiler is not completely enclosed by walls, partitions and ceilings of one-hour fire resistance.

   c. Basement ceiling and first floor are wood studs and planks of less than one-hour fire resistance.

   d. Opening from stairwells lack Class B fire doors.

   e. Floors of bathrooms are cracked and deteriorating.

   f. Numerous windows are inoperable.

   g. Wooden rear porches lack handrails; wood is broken or rotting.

   h. Electrical wiring is inadequate and dangerous, frayed and exposed; service is not properly

grounded; there is no Phase III emergency lighting system.

i. The entrance has cracked stairs and loose mortar.

The Court finds the building in violation, for the above and more.

2. The building is unfit for decent human habitation in that:

a. There are twenty (20) bathrooms for thirty-five (35) units and a lack of adequate plumbing. To use bath, some residents must walk thru rooms other than bedrooms.

b. Some community bathrooms contain water closets not equipped with approved devices.

c. Some units are not equipped with kitchen sink.

d. There are nine (9) mailboxes for thirty-five (35) units.

4.

Letter from
Clerk of Supreme Court of Illinois
showing Order Entered
Denying Leave to Appeal

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

October 19, 1981

Mr. Max Rattner
Attorney at Law
5135 S. Harper Ave.
Chicago, IL 60615

No. 54837 — City of Chicago, et al., respondents, vs. Robert Westphalen, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,
/s/ CLELL L. WOODS
Clerk of the Supreme Court

A-43
5.

Pltf's. Group Exhibit 1
p. 2, Common Law Record

DEPARTMENT OF BUILDINGS

OFFICE OF THE ZONING ADMINISTRATOR
CITY OF CHICAGO

ZONING REQUIREMENTS

ZONING
SEP 15 9 05 AM '64

RECEIVED CITY HALL 63' x 178'

SIZE OF LOT _____

AREA OF BUILDING _____

CLASS OF USE _____

PLATE NO. 12-D

ZONE DISTRICT R4

DATE 9/11 19 64

Application NOT APPROVED.

Proposed improvement does not conform with the requirements of the Chicago Zoning Ordinance.

Address 5325-29 S. Kimbark

Statement:

make — — to a
bldg which contains 15 apts
& 22 eff.

Parking 7.12
Min lot area 7.5-4
7.5 (6)

Examiner: _____
JOHN P. MALONEY
Zoning Administrator

Signature of Applicant Thomas P. Hunter
Address 189 W. Madison St
Chicago 2, Ill.

-2-

Form B.D.Z. 12A

Pltf's. Group Exhibit 1
p. 26, Common Law Record

BOARD OF APPEALS, CITY OF CHICAGO, 210 CITY HALL.

APPLICANT Robert Westphalen

APPEARANCES FOR Robert Westphalen

APPEARANCES AGAINST

CAL. NO. 569-64-A

MAP NO. 12-D

MINUTES OF MEETING November 24, 1964

PREMISES AFFECTED— 5325-29 S. Kimbark Avenue

SUBJECT— Appeal from the decision of the Office of the Zoning Administrator.

ACTION OF BOARD—

Appeal sustained and the decision of the Office of the Zoning Administrator reversed.

THE VOTE

	AFFIRMATIVE	NEGATIVE	ABSENT
S. ERNEST NADHEIM			X
EARL J. MCMAHON	X		
HUBERT F. MEEHAN	X		
KARL M. VITZTHUM	X		
John P. Keenan	X		

THE RESOLUTION:

WHEREAS, Robert Westphalen, owner, filed September 15, 1964, an appeal from the decision of the Office of the Zoning Administrator in refusing to issue a permit to make repairs to a non-conforming three-story brick apartment building containing 16 dwelling and 19 efficiency units, in an R4 General Residence District, on premises at 5325-29 S. Kimbark Avenue; and

WHEREAS, the decision of the Office of the Zoning Administrator rendered September 11, 1964 reads:

"Application not approved. Proposed improvement does not conform with the requirements of the Chicago Zoning Ordinance."

and

WHEREAS, a public hearing was held on this application by the Board of Appeals at its regular meeting held on October 20, 1964; and

WHEREAS, the district maps show that the premises are located in an R4 General Residence District; and

WHEREAS, the Board of Appeals, having fully heard the testimony and arguments of the parties and being fully advised in the premises, finds that in this case the proposed use is to be located in an R4 General Residence District; that the Department of Buildings has ordered that certain repairs be made to the three-story brick non-conforming apartment building in order to comply with building code regulations. It is therefore

RESOLVED, that the appeal be and it hereby is sustained and the decision of the Office of the Zoning Administrator be and it hereby is reversed and he is authorized to issue a permit to make repairs to the non-conforming three-story brick apartment building containing 16 dwelling and 19 efficiency units, on premises at 5325-29 S. Kimbark Avenue, upon condition that all applicable ordinances of the City of Chicago shall be complied with and that plans in triplicate shall be identified as the plans approved by the Board of Appeals before a permit is issued.

APPROVED

APPROVED AS TO SUBSTANCE

PAGE 12 OF MINUTES

0 X 34 in

CITY OF CHICAGO-DEPARTMENT OF BUILDINGS

PERMIT NO. B 517296

PERMIT NO.	WK. CD.	PLAN	LOCATION	DESCRIPTION OF WORK
5172	0201	P	5335 29 S KIMBARK KENWOOD NDP	41 4107 05 87

DESCRIPTION OF WORK

REPAIRS 35 UNITS CORRECT VIOLATIONS

DO NOT TYPE IN THIS SPACE

MASON	PLUMB.	HEATING	OWNER'S NAME AND ADDRESS
	0302		ROBERT WESTPHALEN LAKE ZURICH ILL 6

D	BLD U.	UNITS	CAPS	COST OF WORK	SCHEDULE OF FEES (SEE BELOW FOR EXPLANATION OF CODES) CD.	FEE	CD	FEE	CD	FEE	CD	FEE	CD.	FEE	TOTAL FEES
	1	35		5000			22	47523	4690						

BUILDING DESCRIPTION

NO.	STYS.	BSMT	W	L	H.	NO.	STYS.	BSMT	W	L	H.	NO.	STYS.	BSMT.	W	L	H.

LEGAL DESCRIPTION:

Z. 10.75 B. 26.00

EXPLANATION OF FEE CODES

21 - ELECTRICAL	26 - TANKS
22 - BUILDING	27 - FURNACE
23 - PLUMBING	28 - SMOKE ABATE.
24 - ELEVATORS	29 - WATER
	VENTILATING

ARCHITECT'S NAME AND ADDRESS

IRVING N. ADRIS 350 N CLARK ST

CONTRACTOR'S NAME AND ADDRESS

OWNER

PLUMBING CONTRACTOR'S NAME AND ADDRESS

GOODMAN PLBG 842 W 111TH ST

VENTILATION OR FURNACE CONTRACTOR'S NAME AND ADDRESS

PERMISSION is hereby granted the above named person or firm to construct buildings and do other work as indicated in the schedule hereon, at the location shown. All work is to be done in accordance with approved plans and the ordinances of the City of Chicago, and this permit may be revoked at any time for violation of the ordinances in connection with work hereon authorized.

APPROVED PLANS AND PERMIT SHALL BE KEPT ON FILE AT THE CONSTRUCTION SITE WHILE WORK IS IN PROGRESS (SEC. 43-4.2). WORK DOES NOT START WITHIN SIX MONTHS OF FROM THE DATE OF ISSUANCE, THIS PERMIT SHALL EXPIRE.

THIS PERMIT DOES NOT INCLUDE THE ELECTRICAL INSTALLATION OR SERVICE WHICH MUST COMPLY WITH SEC. 43-4 AND CHAPTERS 31-37-38 OF THE CHICAGO BUILDING CODE.

Received amount indicated hereon

CITY COLLECTOR

Any person violating, or causing, or allowing the enforcement of any of the provisions of the Code pertaining to permits shall be fined not less than $25.00 nor more than $200.00 for each offense. Each day such violation shall continue shall constitute a separate and distinct offense; and any builder or contractor who shall construct any building in violation of the provisions of the City Code, and any architect who shall design, draw plans for, or have supervision of such building, or who shall permit it to be constructed, shall be liable for the penalties provided in this section.

DISPLACED

A-45
7.

Bldg. Permit issued by City to Appellant on May 28, 1976

DEPARTMENT OF BUILDINGS

11th Floor • City Hall • 121 No. LaSalle • Chicago, Illinois 60602 • 744-34

Pepsi X45 for D

June 3, 1976

Robert Westphalen
Box 336 A
Lake Zurich, Illinois

PERMIT # 517296

ADDRESS 5325-29 South Kimbark

You are hereby notified that permit # 517296 issued on 5/28/76 for above premises is hereby revoked because: Failure to comply with Section 7.5-4 (minimum lot area req.) R-4 District and Section 7.12-2 (off street parking requirement) R-4 District. Chicago Zoning Ord. Sec. 7.5-4, 7.12-2.

You will kindly return without delay, said permit to this office for cancellation.

Very truly yours,

FOR THE COMMISSIONER

BY: _____
PATRICK J. NOONAN
Chief Construction Inspector

cc: Mr. Ed Nihill
Bureau of Water
Rm. 101 - City Hall

Mr. Edward McCafferty
Supvr. Permit Dept.
Cook County Assessors Office

James Jung
Division of Conservation

Austin Sullivan
Structural Iron

A. J. Duever & Chas. J. Schoper
Plumbing Bureau

James Cusack
Ventilation Bureau

Robert Molloy
Demolition Section

Bernadine Wright (2)
Permit Section

John Dean
Inst. Insp. Bureau

Central File Copy

CITY OF CHICAGO

Richard J. Daley
Mayor

John F. Fitzgerald
Commissioner

25

BC 108

RJN:ROED:me

9.

Excerpt from Appellant's Motion to Vacate Judgment Order of October 7, 1977

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT — CHANCERY DIVISION

CITY OF CHICAGO, *Plaintiff,*	)	
v.	)	No. 75 CH 53559
ROBERT WESTPHALEN, *Defendant.*	)	
and	)	
BARBARA KRELL and EUGENE KRELL, *Plaintiffs,*	)	
v.	)	No. 75 CH 5992
ROBERT WESTPHALEN, *Defendant.*	)	

Excerpt from objections to findings of fact and conclusions of law and judgment entered pursuant thereto after trial of cause and motion to vacate said judgment and defer judgment for defendant, pp. C1096 and C1097, Common Law Record, presented November 4, 1977.

* * *

The act of revocation by Commissioner Fitzgerald is simply the act of an administrative official making a judicial or quasi-judicial judgment, the effect of which is to deprive unilaterally the defendant of a property rights. There is no provision for a hearing or an administrative appeal. In this regard, Municipal Ordinance 43-10 which is alleged in the pleadings as being applicable by the defendant or Sec. 43-24, relied upon the Court, are both constitutionally defective.

* * *

Having chosen to issue the Permit, the Commissioner may not unilaterally withdraw that right on grounds of alleged non-compliance or alleged illegality absent fundamentally fair procedures to determine whether the alleged non-compliance has actually occurred or whether the alleged illegality actually exists and may not be taken away without observing minimum procedures required by the 14th Amendment which are held to be notice and a hearing. (See GOSS v. LOPEZ, 419 U.S. 571. It is well known by now that the 14th Amendment forbids the State to deprive any person of life, liberty, or property without due process of law.

* * *

10.

Order Denying Appellant's Motion to Vacate Judgment Order

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT — CHANCERY DIVISION

KRELL, *Plaintiff,*	)	
v.	)	No. 75 CH 5992
WESTPHALEN, *Defendant,*	)	
and	)	
CITY OF CHICAGO, a Municipal Corporation, *Plaintiff,*	)	
v.	)	No. 75 CH 53559
WESTPHALEN, *Defendant.*	)	

This cause coming on to be heard on the motion of the Defendant, Robert Westphalen, to vacate the judgment entered on the 7th day of October, 1977, with all parties present and the Court having jurisdiction and being fully advised in the premises;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the motion of the Defendant to vacate the judgment of October 7, 1977 is hereby denied.
2. That the petition for fees present by the Krells is continued to a hearing date to be noticed by the Krells.

ENTER: /s/ ARCHIBALD J. CAREY, JR.
Judge

11.

Notice of Appeal and Proof of Service

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT
(Filed November 13, 1981)

ROBERT WESTPHALEN, *Appellant*,	)	
v.	)	77-1863
CITY OF CHICAGO, A Municipal Corp., EUGENE & BARBARA KRELL, *Appellees*,	)	Nos. 78-1095 78-1251

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that ROBERT WESTPHALEN, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Appellate Court of Illinois, First District, filed herein on 3/4/81, the Supreme Court of the State of Illinois having subsequently on 10/19/81 entered its Order denying Leave to Appeal.

This Appeal is taken pursuant to 28 U.S.C., Sec. 1257(2).

/s/ MAX RATTNER
Counsel for Appellant
5135 S. Harper Ave.
Chicago, Ill. Tel. NO 7-1554

(PROOF OF SERVICE)

(AFFIDAVIT)

Max Rattner, after first being duly sworn, deposes and says that he has personal knowledge of the facts hereinafter set forth and that he can testify competently thereto:

1. That he is the attorney of record for ROBERT WESTPHALEN, Appellant herein and not a member of the Bar of the U.S. Supreme Court;

2. That he has made service on all parties required to be served;

3. A list of persons required to be served is as follows:

CITY OF CHICAGO, A Munic. Corp. City Hall, Chicago, Ill.

EUGENE and BARBARA KRELL, 1217 E. 54th, Chicago, Ill.

4. I personally made service on EUGENE and BARBARA KRELL, by going to their attorneys of record, ISHAM, LINCOLN, and BEAL, located in the First National Plaza, Chicago, Ill, on the 13th day of November, 1981, at about the hour of 3:30 P.M. and handing a copy of the Notice of Appeal to a secretary assigned to receive such notices;

5. I personally made service on the City of Chicago by going to the Office of the Corporation Counsel who represent the City herein and handing a copy of the Notice of Appeal to a secretary assigned to receive such documents, on the 13th day of November, 1981, at about the hour of 3:45 P.M.

6. Additionally, a copy of the Notice of Appeal was sent to the Clerk of the Supreme Court of Illinois because the Record of the Case reposes there by enclosing a copy of the Notice addressed to CLELL L. WOODS, Clerk of the Supreme Court of Illinois, Springfield, 62706, in a plainly addressed envelope, affixing thereto a 20¢ cent stamp, sealing same and dropping it in a

U.S. Mail Box located in the Civic Center, Chicago, Ill. on the 13th day of November, 1981, at about 4:00 P.M.

7. At about 4:00 P.M., on November 13, 1981, I personally went to the Office of the Clerk of the Appellate Court, First District, located in the Civic Center, Chicago, Ill. and filed therein a copy of the Notice of Appeal together with this Proof of Service.

AND FURTHER THE AFFIANT SAYETH NOT.

/s/ MAX RATTNER
Affiant

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 13th DAY
OF NOVEMBER, 1981.

/s/ VERNON L. BECK
Notary Public

12.

Chicago Building Code

Chapter 43-4:

All drawings and plans for the construction, erection, addition to, or alterations of any building or other structure, for which a permit is required shall first be presented to the commissioner of buildings for examination and approval as to proper use of building and premises and as to compliance in all other respects with the Chicago zoning ordinance and shall thereafter be presented to the board of health, the department of smoke inspection, fire department, department of water and sewers, department of streets and sanitation, department of boiler inspection, and department of public works for submission to the proper official of these departments and bureaus for his examination and approval with regard to such provisions of this code, as are within the duty of such office to enforce, and after said drawings and plans have been examined and passed upon, the same shall be returned to the commissioner of buildings where they shall be taken up for examination and approval by the commissioner of buildings.

In every new building and in every existing building undergoing extensive remodeling where a new electric service or a new electric distribution center is to be installed, ample space shall be provided within the main walls of the building for the electric service equipment, metering equipment, distribution cabinets, cutout cabinets, transformers and other equipment necessary for an electric installation and ample working space around the said equipment. This space shall be readily accessible to every tenant of said building who has electric equipment for light, heat or power which is supplied through the above mentioned equipment. (Amend. Coun. J. 7-26-55, p. 883; 11-7-58, p. 8380.)

Chapter 43-7

At the proper time, notice shall be given by the commissioner of buildings to the applicant that his plans have been examined and are ready to be returned to him, and if such plans have been approved as submitted to the various departments and bureaus as aforesaid, the commissioner of buildings shall, according to the building provisions of this code, issue a permit for the construction, erection, repair, or alteration of such building or structure; and shall file such application, and shall apply to such plans a final official stamp, stating that the drawings to which the same has been applied comply with the building provisions of this code. The plans so stamped shall then be returned to such applicant.

Chapter 43-10

It shall be unlawful for any owner, agent, architect, structural engineer, contractor, or builder engaged in erecting, altering, or repairing any building to make any departure from the drawings or plans, as approved by the commissioner of buildings, of a nature which involves any violation of the provisions of this code on which the permit has been issued. Any such departure from the approved drawings and plans involving a violation of requirements, shall operate to annul the permit which has been issued for such work and shall render the same void.

Where any work done under a permit authorizing erection, alteration, or repair of a building or structure, is being done contrary to the approved drawings and plans, the commissioner of buildings or the president of the board of health shall have power to stop such work at once and to order all persons engaged thereon to stop and desist therefrom, which work shall not be resumed until satisfactory assurance has been given to the commissioner of buildings or the president of the board of health, as the case may be, that it will be according to the approved drawings and plans. Nothing in this paragraph shall be construed to prevent minor changes in

arrangement or decoration which do not affect the requirements of any provisions of this code.

Chapter 43-24

If the work, in, upon, or about any building or structure shall be conducted in violation of any of the building provisions of this code, it shall be the duty of the commissioner of buildings to revoke the permit for the building or wrecking operations in connection with which such violations shall have taken place. It shall be unlawful, after the revocation of such permit, to proceed with building or wrecking operations unless such permit shall first have been reinstated or re-issued by the commissioner of buildings. Before a permit so revoked may be lawfully reissued or reinstated, the entire building and building site shall first be put into condition corresponding with the requirements in the building provisions of this code, and any work or material applied to the same in violation of any of the provisions shall first be removed from such building, and all material not in compliance with the building provisions of this code shall be removed from the premises.

Motion to Dismiss or Affirm

Office - ...me Court, U.S.
FILED
FEB 12 1982
...DER L. STEVAS,
CLERK

No. 81-1315

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ROBERT WESTPHALEN,

Appellant,

vs.

CITY OF CHICAGO, a municipal corporation, and BARBARA and EUGENE KRELL,

Appellees.

On Appeal From The Appellate Court Of Illinois First Judicial District

MOTION OF APPELLEE CITY OF CHICAGO TO DISMISS OR AFFIRM

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In The

Supreme Court of the United States

October Term, 1981

ROBERT WESTPHALEN,

Appellant,

vs.

CITY OF CHICAGO, a municipal corporation, and BARBARA and EUGENE KRELL,

Appellees.

On Appeal From The Appellate Court Of Illinois First Judicial District

MOTION OF APPELLEE CITY OF CHICAGO TO DISMISS OR AFFIRM

The City of Chicago, a municipal corporation, appellee, moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Appellate Court of Illinois, First District, on the grounds that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument and that the judgment below rests on an adequate non-federal basis.

STATEMENT OF THE CASE

This is an appeal from a decision of the Illinois Appellate Court, First District, entered on March 4, 1981, which affirmed an October 7, 1977, judgment of the Circuit Court of Cook County, Illinois. On October 19, 1981, the Supreme Court of Illinois denied appellant Leave to Appeal. Jurisdiction for this appeal is based on 28 U.S.C. §1257(2).

In June, 1975, the City of Chicago filed the present action alleging that the appellant's 35-unit apartment building contained 69 violations of the City of Chicago building, electrical, plumbing and fire codes. In September, 1975, a parallel suit filed by Barbara and Eugene Krell, neighbors of the subject property, was filed and consolidated with the City action.

In May, 1976, while court proceedings were pending on the building code violations, the appellant applied for a city building permit to make repairs in his building. The building permit was issued on May 28, 1976, but was revoked by the Chicago Building Commissioner on June 3, 1976, because the plans accompanying the permit application showed that appellant had failed to comply with the minimum lot area and off-street parking requirements of the Chicago Zoning Ordinance.

In January, 1977, the gas boiler in appellant's building malfunctioned, causing the death of one tenant and the hospitalization of five others due to carbon monoxide poisoning. On January 19, 1977, the building was ordered vacated because it failed to comply with minimum health and safety standards. The building remained vacant during the remainder of the proceedings.

On October 7, 1977, after 69 court appearances and 16 days of trial, the Circuit Court of Cook County, Illinois, found that 69 building, electrical, plumbing and fire code violations existed on the property. A fine of $100.00 for each code violation was entered and suspended. A receiver was appointed to collect rents and to correct the code violations.

Appellant appealed to the Illinois Appellate Court raising 21 separate grounds for reversal. Only one of these arguments dealt with an alleged violation of due process by the City in its failure to hold an adversary hearing prior to the revocation of the building permit. On March 4, 1981, the Illinois Appellate Court affirmed the judgment of the Circuit Court of Cook County, Illinois, in its entirety. A Petition for Leave to Appeal was filed with the Supreme Court of Illinois which was denied on October 17, 1981.

ARGUMENT

I.

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT.

The appellant alleges that the Due Process Clause of the 14th Amendment requires that the City of Chicago hold an adversary hearing prior to a revocation of a building permit. Since the case of *Board of Regents v. Roth*, 408 U.S. 564 (1972), the determination as to whether a person has a sufficient property interest in a benefit as would require a due process hearing prior to the termination of the benefit has been made by reference to state law. A property interest has been recognized only where state law has created such an interest.

In Illinois, the law is clearly established that no legal right is created by the issuance of a building permit unless that permit was lawfully issued. *City of Chicago v. Zellers*, 64 Ill. App.2d 24 (1965). No building permit is lawfully issued unless the permit application is in accordance with the requirements of law and no rights are conferred upon a permittee by the issuance of a building permit beyond those sanctioned by the applicable ordinance. *Ganley v. City of Chicago*, 18 Ill. App.3d 248 (1974).

The illegal issuance of a building permit, in Illinois, does not prevent a municipality from relying on the illegality and revoking the permit, notwithstanding the fact that the applicant may have expended money or incurred obligations in good faith and in substantial reliance upon the permit. *City of Rockford v. Sallee*, 129

Ill. App.2d 75 (1970). Thus, under the applicable state law, appellant received no property right by the illegal issuance of the building permit and accordingly, a due process hearing is not necessary for the revocation of the permit.

It is important to note that the appellant has never claimed that his application for the building permit did, in fact, meet the requirements of law. To the contrary, both the trial court and the appellate court found that the permit application clearly showed that the appellant's plans would fail to meet the applicable zoning requirements of the City of Chicago. Thus even if appellant had been given a due process hearing the result would not have changed, the permit would have been revoked.

In addition, appellant failed to seek the judicial remedy afforded by Illinois law to challenge a revocation of a building permit. Illinois law allows judicial review of a decision to revoke a building permit by petition for a Writ of Mandamus. This state law procedure affords appellant a forum to vindicate any rights he feels were afforded him by the issuance of the building permit and satisfies the Due Process requirements of the Fourteenth Amendment. *Parratt v. Taylor*, ... U.S. ....., 49 U.S.L.W. 4509 (May 18, 1981.)

The arguments advanced by the appellant in his jurisdictional statement are based on the assumption that the appellant had a property right in the issuance of the building permit. However, insofar as Illinois law recognizes no such property right and insofar as state law affords the appellant a judicial procedure for the assertion of his claims, there is no requirement recognized in law that a due process hearing be provided

prior to the revocation of the building permit by the City.

Because the questions raised by the appellant are settled questions of law, no substantial question remains for further argument before this Court.

II.

THE OPINION BELOW RESTS ON ADEQUATE NON-FEDERAL BASIS.

The instant appeal involves a trial court finding that the building owned by the appellant contained 69 violations of the Chicago Building Code. This was the judgment which was appealed to, and affirmed by, the Appellate Court of Illinois. This decision is clearly correct and appellant does not contend otherwise in this Court.

In affirming the trial court, the Appellate Court of Illinois stated that:

> "In the instant case . . . the court concluded that the defendant's building violated 69 provisions of the Municipal Code. . . . These findings were not contrary to manifest weight of the evidence, nor does the defendant contend otherwise. Throughout the proceedings, the defendant did not argue an absence of violations, but instead argued that he had affirmative defenses which, as discussed above, were properly rejected." (Appendix to Jurisdictional Statement, A-19).

The due process claim asserted in this appeal was only one of the affirmative defenses asserted below. The other defenses were 1) whether the appellant had been granted a nonconforming use in 1964; 2) whether fire wall regulations applied to appellant's building; 3) estoppel; 4) prejudice of the trial judge; 5) denial of

plaintiff's motion for summary judgment; and 6) whether the Krells were proper plaintiffs. All of these non-federal defenses were rejected by the Appellate Court of Illinois.

Thus even if this Court were to decide the due process issue raised by the appellant, such a decision would not effect the judgment of the trial court that appellant's building violated 69 provisions of the Chicago Building Code. Because this judgment rests on adequate non-federal grounds this Court should deny appellant further review.

III.

THIS APPEAL RAISES ISSUES NOT PRESENTED IN PRIOR JUDICIAL PROCEEDINGS.

The Jurisdictional Statement seeks a determination by this Court that Chapter 43, section 43-24 of the Municipal Code of Chicago is unconstitutional because: 1) it applies only to building violations and not to zoning violations; 2) it delegates arbitrary power to the Building Commissioner of Chicago without adequate guidelines; and 3) failure of the ordinance to establish fair rules of procedure. (Jurisdictional Statement, p. 11). None of these issues were raised at any time during the proceedings below. Appellant's sole contention regarding the provision of Chapter 43 of the Municipal Code of Chicago was that the failure to provide a hearing prior to the revocation of a building permit violated due process. Accordingly, these new contentions regarding the unconstitutionality of Chapter 45, section 43-24 of the Municipal Code of Chicago are not properly before this Court on appeal and such appeal should be dismissed.

CONCLUSION

For the reasons stated above, it is clear that the decision of the Appellate Court of Illinois, First District, affirming the judgment of the Circuit Court of Cook County, Illinois, was correctly decided and is based on adequate non-federal grounds and that no substantial question of federal law remains for consideration by this Court. Accordingly, the appellee, City of Chicago, a municipal corporation, respectfully requests that this Court dismiss the instant appeal or, in the alternative, affirm the judgment below.

Respectfully submitted,

STANLEY GARBER,
Corporation Counsel of the City of Chicago,
511 City Hall, Chicago, Illinois 60602,
Attorney for Appellee City of Chicago.

ROBERT R. RETKE,
JEROME A. SIEGAN,
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Telephone: (312) 744-6939.

February 10, 1982

Motion to Dismiss or Affirm

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CLERK

No. 81-1315

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ROBERT WESTPHALEN,

Appellant,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION, AND BARBARA AND EUGENE KRELL,

Appellees.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS

MOTION OF APPELLEES BARBARA AND EUGENE KRELL TO DISMISS OR AFFIRM

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February 11, 1982

Pandick Press Midwest, Inc., Chicago • (312) 454-7600

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ROBERT WESTPHALEN,

Appellant,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION, AND BARBARA AND EUGENE KRELL,

Appellees.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS

MOTION OF APPELLEES BARBARA AND EUGENE KRELL TO DISMISS OR AFFIRM

Appellees Barbara and Eugene Krell move the Court to dismiss this appeal or, in the alternative, to affirm the judgment of the Appellate Court of Illinois. That judgment rests on an adequate non-federal basis. Moreover, no substantial federal question is presented by this appeal.

THE NATURE OF THE CASE

This case involves an apartment building in Chicago, Illinois, owned by the appellant. [Jurisdictional Statement, A-2] Both the appellee, City of Chicago and appellees, Barbara

and Eugene Krell (neighboring residents to the building) brought suit in the Circuit Court of Cook County, Illinois, to compel the defendant to remedy serious building and zoning code violations in the building. [A-1, 2]*

The Circuit Court found that there were numerous building, housing, electrical and plumbing code violations rendering the building unsafe, dangerous and unfit for decent human habitation. [A-19] Accordingly, the Circuit Court appointed a receiver to correct the violations [A-20]. [Illustrative of the serious nature of the violations, during the pendency of the case carbon monoxide spillage from an unclean furnace killed one tenant and hospitalized a number of others. [A-15-18, A-33]]

The appeal in this case does not, however, involve any issues directly relating to the judgment of the Circuit Court. Instead, it turns solely on what can at most be considered a side issue in the case.

Prior to the trial, the defendant obtained a building permit from the City to do work on the building. That permit was revoked three business days after its issuance by the City because it was found to have been incorrectly issued. [A-33] No testimony established any substantial reliance by defendant on the fleeting issuance of the permit. [A-38] The work called for by the permit would not have corrected many of the more serious violations. [A-33] The Circuit Court held, as part of the decision in the trial, that the permit had been correctly revoked. [A-38] The Appellate Court of Illinois affirmed that decision.

This appeal seeks to have this Court review the constitutionality of the revocation of the building permit. The appellant contends that he was entitled to a due process hearing before the permit was revoked and that it was unconstitutional to have afforded him only a post-revocation hearing.

---

* Under Illinois law, neighboring residents to a building may bring suit to compel compliance with building and zoning code requirements. *Ill. Rev. Stat.*, ch. 24, § 11-13-15 (1979). [A-1]

ARGUMENT

A. The Decision of the Appellate Court of Illinois Rests on an Adequate Non-Federal Basis

The Judgment of the Circuit Court was to appoint a receiver to correct City Code violations. The decision that the building had numerous City Code violations, of course, rested solely on state law matters. The issue of the revocation of the building permit was of only remote relevance to the judgment of the Circuit Court, tending to indicate that appointment of a receiver was a proper remedy.

Moreover, even the decision that the revocation of the building permit was lawful rests on an adequate state law basis. The appellant contends that he was denied property without due process of law when his permit was revoked. The question of whether the appellant had any property interest in the permit to which due process could apply is, however, a matter of Illinois law. *Bishop* v. *Wood,* 426 U. S. 341, 344 (1976); *Board of Regents* v. *Roth,* 408 U. S. 564, 577 (1972).

The Appellate Court of Illinois held that the appellant had no property interest in the permit:

> "... under Illinois law the permittee does not have a vested right to complete his approved plans unless the building permit was legally issued and the property owner substantially changed his position or incurred substantial expenditures or obligations. ..."
>
> * * *
>
> "[O]n the basis of the testimony and exhibits discussed above, we believe there was sufficient evidence to support a finding that the defendant's permit was erroneously issued and that the permit was a nullity and conferred no right upon the permittee." [A-4-5].

Since, under Illinois law and the facts of the particular case, the appellant had no property rights in undertaking work under an improperly issued building permit, the prompt revoca-

tion of the permit did not deprive him of property at all. No issue of due process was presented. The decision of the Appellate Court of Illinois was made on the basis of an adequate state law ground, independent of any federal claim.

B. The Case Presents No Substantial Federal Question

The appellant was not denied a hearing on the revocation of his permit. Under Illinois law, he was entitled to a prompt administrative hearing on the permit before the Chicago Board of Zoning Appeals. [*Ill. Rev. Stat.*, ch. 24, § 11-13-3 (1979)] He did not seek such a hearing. He was also entitled to and received a prompt judicial review of the permit revocation.

Appellant's argument in the Jurisdictional Statement is that he was entitled to a pre-revocation hearing. In other words, he argues that he had a right to undertake work in the building while a hearing was held as to whether the building permit was properly issued. Here, the permit was revoked almost immediately. There was no showing of any substantial reliance on the permit. It was, in effect, as if the permit had been simply denied.

Putting aside the question of whether there was any property interest in the continued existence of the permit, it is clear that there is no constitutional right to a pre-revocation hearing on a building permit under the particular circumstances of this case. Revocation of a building permit is an instance in which prompt action by a municipality is required. To require a pre-revocation due process hearing before a building permit could be lawfully revoked would mean that dangerous construction could go ahead before a municipality could stop work.

In instances in which prompt governmental action may be necessary to protect the public interest, an opportunity for a prior hearing is not required. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 679 (1974) (seizure of a

yacht to prevent removal); *North American Cold Storage Co.* v. *City of Chicago,* 211 U. S. 306 (1908) (seizure of contaminated food).

Considering the relatively minor interference caused by preventing work from going forward under an improperly issued building permit and the clear necessity of prompt governmental action, no pre-revocation hearing was constitutionally required. No federal question of substance is therefore presented in this case.

C. No Jurisdiction Lies for an Appeal —Certiorari is also Inappropriate

An appeal from a final judgment of a state court lies in cases in which there was drawn in question the validity of a statute of the state on the ground of its being repugnant to the Constitution. 28 U.S.C. 1257(2). In this case, however, there was not drawn into question the constitutionality of state statutes (including municipal ordinances).

The revocation of the building permit in issue was upheld under authority of state common law. [A-3-6] The Appellate Court of Illinois did not, therefore, need to consider the constitutionality of the Chicago ordinances in this regard. Accordingly, the appeal is without jurisdiction.

If the Jurisdictional Statement is, nonetheless, taken as a petition for a writ of certiorari (28 U.S.C. 2103), it should be denied. It fails to state any special or important reason why a full hearing in this case by this Court is required. The case turns primarily on the interpretation of Illinois law concerning facts and legal implementation of Chicago's building code. It does not involve important nationally applicable legal issues. It is about as much a case of local law as is possible.

CONCLUSION

For these reasons, the appeal should be dismissed or, in the alternative, the decision of the Appellate Court of Illinois affirmed. If the Jurisdictional Statement is taken as a petition for writ of certiorari, it should be denied.

Respectfully submitted,

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Appellant's Reply Brief

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October Term, 1981

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VS.

CITY OF CHICAGO, A Munic. Corp.,
and BARBARA and EUGENE KRELL,
Appellees,

On Appeal From the Appellate Court of Illinois
First Judicial District

APPELLANT'S REPLY TO MOTION OF CITY TO DISMISS OR AFFIRM

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APPELLANT'S REPLY TO MOTION TO DISMISS OR AFFIRM

In support of its motion to dismiss or affirm, Appellee City of Chicago raises the following points:

1. The case presents no substantial question not previously decided by this court;

2. The opinion below rests on adequate non-federal basis;

3. This appeal raises issues not present in prior judicial proceedings.

WAS APPELLANT'S PERMIT LAWFULLY ISSUED?

Appellee City states on p. 4 of its motion that in Illinois, the law is clearly established that no legal right is created by the issuance of a building permit unless the permit was lawfully issued. Assuming this to be true, the question then arises: how is it to be determined that the permit was or was not legally issued? Is it to be determined by an adjudicatory process or by a deus ex machina method?

Appellant does not quarrel with the principle of law that a municipality is not prevented from relying on the fact that a permit was illegally issued. But the municipality must establish that the permit was illegally issued as a result of an adjudicatory hearing and not as a result of a deus ex machina pronouncement.

In this particular case, we are dealing with a permit that was issued to the appellant by the Building Commissioner after the payment of a substantial fee, in due course. The reason ascribed

for the revocation was failure to comply with certain zoning ordinances relating to off-street parking and insufficient lot area. The trial court did not find that any zoning violations existed (p. A-8 of Juris. Statement). Thus, the revocation of the permit was based on reasons which did not exist.

The options of the City of Chicago in this matter were numerous. The easiest and most decisive way was to extend to the appellant a hearing at which time the City would have an opportunity to establish any and all illegalities which they alleged existed. But the City decided that all they had to do was to write the appellant a letter telling him that his permit was revoked and to bring it in for cancellation (p. A-46 of Juris. Statement). It must be remembered that the permit was not issued subject to the will of the Commissioner and that revocation herein is not a completely administrative act but a judicial or quasi-judicial one.

The presumption that the permit issued to the appellant in due course is valid is easily overcome by a hearing which establishes that the permit was indeed illegally issued but can never be overcome by deus ex machina pronouncements which is the method adopted by the City.

On p. 5 of its motion, the City states:

> Thus even if appellant had been given a due process hearing the result would not have changed, the permit would have been revoked.

The answer to this comes from the case of COE V. ARMOUR FERTILIZER WORKS, 237 U.S. 413, 424(1914):

> The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. "To one who protests against the taking of property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense on the merits."

Further, on p. 5 of its motion, the City states:

> In addition, appellant failed to seek the judicial remedy afforded by Illinois law to challenge a revocation of a building permit, Illinois law allows judicial review of a decision to revoke a building permit by petition for Writ of Mandamus. ...

In the trial judge's Memo. Accompanying Decision (p. A-35 of Juris. Statement), we find:

THE DEFENDANT ASSERTED AFFIRMATIVE DEFENSES

1. Revocation of permit issued May 28, 1976 was unlawful violation of defendant's right to due process and asked leave to file mandamus action for reissuance.

Evidently, the foregoing material must have been overlooked by the City.

CATCH 22

On p. 7 of its motion, the City states:

> Thus even if this Court were to decide the due process issue raised by the appellant, such a decision would not e(a)ffect the judgment of the trial court that appellant's building violated 69 provisions of the Chicago Building Code. Because the judgment rests on adequate non-federal grounds this Court should deny appellant further review.

Thus, it is revealed that the theory of the City is that even though the Court should find that appellant was denied due process of law as a result of which his Building Permit was wrongfully revoked as a result of which he was prevented from correcting existing violations as a result of which he was found guilty of violations, that even then the findings of the Illinois courts would be just, fit-

ting and proper.

THIS APPEAL RAISES NO ISSUES NOT PRESENTED IN PRIOR PROCEEDINGS

The question of Chap. 43-24 of the Chicago Building Code and its relation to the proceedings below never surfaced until after the trial when the judge upon entering his judgment order accompanied it with his Memo. At that time, the judge revealed that in arriving at his decision as to whether the issued permit established a ground for estoppel he had relied upon Sec. 43-24 of the Code (p. A-36 of Juris. Statement). The judgment order and Memo. were entered on Oct. 7, 1977. On Nov. 4, 1977, appellant presented his motion to vacate judgment order on the grounds, inter alia, that both Secs. 43-10 and 43-24 were constitutionally defective and that the Commissioner, having chosen to issue the Permit, may not unilaterally withdraw that right on grounds of alleged non-compliance or alleged illegality absent fundamentally fair procedures to determine whether the alleged

non-compliance has actually occurred or whether the alleged illegality actually exists and may not be taken away without observing minimum procedures required by the 14th Amendment which are held to be notice and hearing (pp. A-47 and A-48 of Juris. Statement.

CONCLUSION

Wherefore, for all of the foregoing reasons, the appellant respectfully asks the Court to deny Appellee City of Chicago's motion to dismiss or affirm.

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Appellant's Reply Brief

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In support of their motion to dismiss or affirm, Appellees Krell raise the following points:

1. The Decision of the Appellate Court of Illinois Rests on an Adequate Non-Federal Basis;

2. The Case presents No Substantial Federal Question;

3. No Jurisdiction Lies for an Appeal;

DOES THE DECISION OF THE ILLINOIS APPELLATE COURT REST ON AN ADEQUATE NON-FEDERAL BASIS?

Appellees' position is based on the underlying premise that under Illinois law and the facts of this particular case, the appellant has no property rights in undertaking work under an improperly or illegally issued building permit (p. 3 of motion).

This may or may not be the law of Illinois but the only proof we have that the permit was improperly or illegally issued was that the Commissioner of Buildings said so. In his Notice of Revocation, he stated that appellant's permit was revoked because of failure to comply with minimum lot area and off-street parking requirements of the Chicago Zoning Ordinances (p. A-46 of Juris. Statement). However, the Appellate Court stated in its Opinion that the trial court did not find that zoning violations had occurred. (p. A-8 of Juris. Statement).

Thus the revocation which is founded on reasons which do not exist is a nullity and of no force ...

or effect and is obviously inadequate to overcome the existing presumption that the permit was regular and legally issued. It is reasonable and fair to say that the legitimate area of inquiry here is not was the permit illegally issued but was the permit illegally revoked?

An analogous situation is found in TRANS-OCEAN OIL CORP. V. CITY OF SANTA BARBARA, 85 Cal. App2d 776, 783, 194 P.2d 148, 152 (1948) wherein the Court held:

> It is not, nor could it be claimed that a city council exercises unlimited discretion in the matter of revoking permits. A permit having issued, the power of a municipality to revoke it is limited. If the permittee does nothing beyond obtaining the permit or fails to comply with reasonable terms or conditions expressed in the permit granted, the proper authorities may revoke it. But that is not to say that such revocation can be made without notice, hearing or the taking of evidence.

With respect to the attempted revocation of the permit in the TRANS-OCEAN case, the court held (ibid, p. 160):

> The resolution of revocation ... adopted without notice or hearing or reception of competent evidence, was inoperative and of no legal force.

Thus, it is and remains the position of appellant that the presumption that the permit was legally issued was never overcome by any tribunal of competent jurisdiction in the context of meaningfulness as to time and manner. The determination that the permit was illegally issued was never even submitted to any tribunal of competent jurisdiction in the context hereinabove mentioned. Since the permit was not issued subject to the absolute discretion of the building commissioner, the power of the commissioner over the permit, if any, is not purely administrative but judicial or quasi-judicial.

DOES THE CASE PRESENT NO SUBSTANTIAL FEDERAL QUESTION?

On p. 4 of their motion, Appellees Krell say:

> The appellant was not denied a hearing on the revocation of his permit. Under Illinois law, he was entitled to a prompt administrative hearing on the permit before the Chicago Board of Zoning Appeals. (Ill.Rev. Stat. chap 24, sec. 11-13-3. He did not seek such a hearing. He was also entitled

> to and received a prompt judicial review of the permit revocation.

It is true that pursuant to the above statute, the City of Chicago created a Board of Appeals (Chicago Zoning Ordinances, Sec. 11.3-2). The jurisdiction of the Board is as follows:

> The Board of Appeals is hereby vested with the following jurisdiction and authority (1) to hear and decide appeals from any order, requirement, decision or determination made by the Zoning Administrator under this comprehensive amendment.

Since the jurisdiction of the Chicago Zoning Board of Appeals is limited to appeals from orders, etc. of the Zoning Administrator and since the revocation of Appellant's Building Permit emanated from the Building Commissioner, it was felt that an appeal to the zoning board of appeals was not indicated in this case.

As to Appellees Krells' statement that appellant was entitled to and received a prompt judicial review of the permit revocation, the record shows that appellant's permit was revoked on June 3, 1976 (p. A-46 of Juris. Statement) and that a

definitive ruling that the Building Commissioner was correct in revoking the permit was not forthcoming until after the trial on Oct. 7, 1977 (p. A-38 of Juris. Statement), well beyond what might fairly be considered meaningful as to time and manner.

The further statement by the Appellees Krell that revocation of a building permit is an instance in which prompt action by a municipality is required (p. 4 of motion) is too broad to have any value. In this particular case it would seem that all the parties involved would have been better served had the municipal authorities observed fairness in their decision making processes and heeded constitutional restraints. The matter of extending to appellant a due process hearing could have been expeditiously arranged. No prudent person would have continued work in the face of an impending hearing. The compelling reasons for summary action as in seizure of contaminated food or the seizure of a yacht which otherwise might

just sail away are not present in the instant case. The Constitution of the United States, it would seem, is more honored in the breach than in the observance.

DOES THE SUPREME COURT HAVE JURISDICTION OVER THIS APPEAL?

The Appellees Krell say that the revocation of the permit in issue was upheld under authority of state common law and that the Appellate Court did not, therefore, need to consider the constitutionality of the Chicago ordinances in this regard (p.5 of their motion).

Frankly, the applicability of this Nixonian argument to the present proceedings is most difficult to comprehend and at first blush appears to be an attempt to repeal Article VI of the United States Constitution. Be that as it may, the trial court, in its Memorandum Accompanying Decision, stated that in reaching his decision, he relied on Sec. 43-24 of the Chicago Building Code (p. A-38 of the Juris. Statment) and the

Appellate Court agreed with the trial court's finding that the defendant (appellant) provided no showing that a pre-revocation hearing was required and that no such legal requirement exists in this State (p. A-4 of Juris. Statement).

CONCLUSION

Wherefore, for all the foregoing reasons, the appellant respectfully asks the Court to deny Appellees' motion to dismiss or affirm.

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